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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1945

No. 427

BRUCE'S JUICES, INC., PETITIONER,

*vs.*

AMERICAN CAN COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

PETITION FOR CERTIORARI FILED SEPTEMBER 5, 1945.

CERTIORARI GRANTED NOVEMBER 13, 1945.

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1945

## No.

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BRUCE'S JUICES, INC., PETITIONER,

*vs.*

AMERICAN CAN COMPANY

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 2, 1945.

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[fol. a] [Caption omitted]

[fol. 1]

**IN CIRCUIT COURT OF HILLSBOROUGH COUNTY**

On the 23rd day of July, 1942, Declaration was filed in Law Action No. 23454 in words and figures as follows:

DECLARATION

The plaintiff, American Can Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey and duly authorized to transact business in the State of Florida, by its undersigned attorney, sues the defendant, Bruce's Juices, Inc., a corporation organized and existing under the laws of Florida, for that:

First Count

On, to-wit, the 30th day of March, 1942, the said defendant, by its promissory note of said date, now overdue, promised to pay to the order of the plaintiff, at the office of the plaintiff, 230 Park Avenue, New York, New York, the sum of $12,000.00, ninety days after date, with interest after date at the rate of 5% per annum until paid; that the maker, securities and endorsers on said note agreed that should it become necessary to collect said note through an attorney, to pay all costs of such collection, including a reasonable attorney's fee; and the drawers and endorsers thereon severally waived presentment for payment, protest and notice of protest and non-payment of said note. That there is now due, owing and unpaid to the plaintiff on said note the principal thereof in the sum of $12,000 together with interest thereon from May 30, 1942, at the rate of 5% per annum until paid. That it has become necessary to collect said note through an attorney, and plaintiff has employed the undersigned attorney in this behalf and has promised and become obligated to pay him for his services herein, a reasonable attorney's fee, the amount thereof to be fixed by the Court herein, and plaintiff alleges that a reasonable attorney's fee is 10% of the amount of principal [fol. 2] and interest involved, plus $50.00 filing fee.

(Copy of Cause of Action Attached.)

Second Count

The plaintiff sues the defendant in this second count of its declaration for that on to-wit February 23, 1942, by its promissory note of said date, now overdue, the defendant promised to pay to the order of the plaintiff at plaintiff's offices, 230 Park Avenue, New York, New York, ninety days after date, the sum of $19,799,97, with interest after date at the rate of 5% per annum after date until paid. That the said note was not paid at maturity, and that there is now due, owing and unpaid to the plaintiff on said note the principal amount thereof in the sum of $19,799.97, together with interest from May 28, 1942, at the rate of 5% per annum until paid.

(Copy of Cause of Action Attached.)

Third Count

Plaintiff sues defendant in this third count of its declaration for that on to-wit, February 23, 1942, defendant by its promissory note of said date, now overdue, promised to pay to the order of American Can Company Southern, at its offices, 230 Park Avenue, New York, New York, ninety days after date, the sum of $7,039.25, with interest after date at the rate of 5% per annum until paid. That the said American Can Company Southern endorsed, transferred and delivered said note to the plaintiff before maturity, for a valuable consideration, and the plaintiff is now the owner and holder of said note. That there is now due, owing and unpaid, to the plaintiff on said note the principal amount thereof in the sum of $7,039.25, together with interest from May 28, 1942, at the rate of 5% per annum until paid.

(Copy of Cause of Action Attached.)

[fol. 3] And plaintiff alleges that it is the owner and holder in good faith for value of the foregoing described three promissory notes, and that the same are all past due, owing and unpaid, as alleged.

Wherefore, plaintiff sues the defendant and claims damages in the sum of Fifty Thousand Dollars ($50,000.00).

John M. Allson, Attorney for Plaintiff.

151.67 572

$12,000.00 Tampa, Fla., March 30, 1942.

Ninety days after date we promise to pay to the order of American Can Company Twelve Thousand and 0/100 Dollars at the office of American Can Co., 230 Park Ave., New York, N. Y. for value received with interest from date at the rate of five per cent per annum until paid.

Renewal

Now, should it become necessary to collect this note through an attorney, either of us, whether makes security or endorser, on this note, hereby agrees to pay all costs of such collection, including a reasonable attorney's fee. The drawers and endorsers severally waive presentment for payment, protest and notice of protest and non-payment of this note.

Bruce's Juices, Inc., by G. P. Peer, Asst. Treas.

No. ——. Due (Renews No. 85). AWG.
June 28/29.

332

City: Tampa. State: Florida.

Date: February 23rd, 1942.

Ninety days after date we promise to pay to the order of American Can Company nineteen thousand seven hundred ninety-nine and 97/100ths—$19,799.97 Payable at American Can Company, 230 Park Avenue, New York, N. Y. Value Received, with interest at 5 per cent per annum after date.

[fol. 4] Bruce's Juices, Incorporated, by G. P. Peer, Asst. Treas.

No. Renewal 2856. Due May 24th/25, 1942.
Aw9.

(On Back Thereof)

For value received, —— hereby guarantee payment of the within note at maturity, or at any time thereafter, with interest at the rate of —— per cent per annum until paid, and hereby waive presentment for payment, Protest and Notice of Protest.

Paid May 28, 1942. 250.25 Interest.

S-71

City: Tampa. State: Florida.

Ninety days after date we promise to pay to the order of American Can Company Southern, Seven Thousand Thirty-nine and 25/100ths $7,039.25. Payable at American Can Company Southern, 230 Park Avenue, New York, N. Y. Value Received, with interest at 5 per cent per annum after date.

Bruce's Juices, Incorporated, by G. P. Peer, Asst. Treas.

No. Renews S-330. Due May 24/25, 1942.
Aw9.

(On Back Thereof)

For Value received, —— hereby guarantee payment of the within note at maturity, or at any time thereafter, with interest at the rate of —— per cent per annum until paid, and hereby waive presentment for payment, Protest and Notice of Protest.

Paid May 28, 1942. 88.96 Interest.

[fol. 5] In Circuit Court of Hillsborough County

On the 6th day of November, 1942, Amended Pleas were filed in Law Action No. 23454 in words and figures as follows:

AMENDED PLEAS

Comes now the Defendant, Bruce's Juices, Inc., by its attorney undersigned, and files this its pleas to the declaration of the Plaintiff filed herein, and says:

First Plea

For plea to the first and second counts of Plaintiff's declaration, that the promissory notes described in said first and second counts were given by the Defendant as part of a transaction involving the sale of cans by the Plaintiff to the Defendant, and that said notes evidenced the purchase price of said cans; that the transaction involving said sale of cans was unlawful, in that, Plaintiff in the course of such transaction and while engaged in commerce among the several states, directly and indirectly discriminated in price between different purchasers of commodities, to-wit, cans, of like grade and quality, said commodities being sold for use and resale within the United States of America and where the effect of such discriminations

was substantially to lessen competition or tend to create a monopoly in the particular line of commerce in which the Defendant was and is engaged and to injure, destroy and prevent competition with certain customers of said Defendant in violation of paragraph (a) of Section 13 of Title 15, United States Code; therefore, the consideration for said notes is illegal and said notes void and of no force and effect.

Second Plea

For further plea to the first and second counts of Plaintiff's declaration, Defendant says that the promissory notes described in said first and second counts were given [fol. 6] by the Defendant as part of a transaction involving the sale of cans by the Plaintiff to the Defendant, and that said notes evidenced the purchase price of said cans; that the transaction involving said sale of cans was unlawful, in that, Plaintiff in the course of such transaction and while engaged in commerce among the several states discriminated in favor of certain purchasers of a commodity, to-wit, cans and against the Defendant, a competitor of such purchasers, which cans were bought for resale in interstate commerce by furnishing to such purchasers certain facilities, to-wit, equipment for the closing of cans, referred to in the trade as "closing equipment," without cost or charge to said purchasers, and while charging rent for said equipment furnished to the Defendant, in violation of paragraph (e) of Section 13, Title 15, United States Code; therefore, the consideration for said notes is illegal and said notes void and of no force and effect.

Third Plea

For a third plea to the first and second counts of Plaintiff's declaration, Defendant says that the promissory notes described in said first and second counts were given by the Defendant as part of a transaction involving the sale of cans by the Plaintiff to the Defendant, and that said notes evidenced the purchase price of said cans; that the transaction involving said sale of cans was unlawful, in that, Plaintiff in the course of such transaction and while engaged in commerce among the several states, sold cans which discriminated to its knowledge against competitors of such purchasers, in that, discounts and

allowances were granted to such purchasers over and above any discounts or allowances available at the time [fol. 7] of such transaction to said competitors, namely, the Defendant and others similarly situated in respect of the sale of goods, to-wit, cans, of like grade, quality and quantity, in violation of Section 13a of Title 15, United States Code.

Defendant alleges more particularly that there are located in Tampa, Florida, canning plants of the California Packing Corporation and Stokely Bros. & Co., Inc., each of said plants canning juices in Tampa, and that as a part of the transaction heretofore mentioned, did sell the same throughout the United States in competition with the Defendant; that the Defendant likewise operates a large canning plant located in Tampa; that the Plaintiff since June, 1936, has allowed said competitors of the Defendant on the cans purchased from the Plaintiff, manufactured in Plaintiff's Tampa plant and used by said competitors in canning juices in Tampa, a large and discriminatory discount, which, according to the information and belief of Defendant, is Five per cent (5%), and which discount the Plaintiff would not and did not allow Defendant on cans manufactured in said Tampa plant of the Plaintiff and purchased by the Defendant.

Defendant further alleges that the following corporations, to-wit, California Packing Corporation, Stokely Bros. & Co., Inc., Hawaiian Pineapple Company, Ltd., Libby, McNeill & Libby, Inc. and The Great Atlantic and Pacific Tea Company, are large canners of juices whose products are canned and sold throughout the United States in direct competition with the juices manufactured and canned by the Defendant; that on the purchase price of cans purchased by said above named corporations, and each of them, the Plaintiff has, since June, 1936, allowed large [fol. 8] and discriminatory discounts, which, to the best of Defendant's information and belief, are between Three percent (3%) and Five percent (5%), which said discounts the Plaintiff would not and did not allow the defendant on cans purchased by it from the Plaintiff.

Defendant further alleges that on cans manufactured by the Plaintiff in its plant at Tampa, Florida, the Defendant was required to pay all delivery charges to the Defendant's place of business between 1935 and 1940; that during said period, Defendant was required to and did

pay such delivery charges to the sum of approximately Eleven Thousand ($11,000.00) Dollars, and that during the same period of time on cans manufactured in the Plaintiff's same factory at Tampa, and purchased by certain of Defendant's Competitors, to-wit California Packing Corporation and Stokely Bros. & Co., Inc., the Plaintiff delivered said cans to the place of business of said competitors without charge to them, thus discriminating against the Defendant and in favor of the Defendant's competitors.

That such transactions are unlawful and in violation of the aforesaid Section of the United States Code; therefore, the consideration for said notes is illegal and said notes void and of no force and effect.

Fourth Plea

For a fourth plea to the first and second counts of Plaintiff's declaration, Defendant says that the promissory notes described in said first and second counts were given by the Defendant as a part of a transaction involving the sale of cans by the Plaintiff to the Defendant, and that said notes evidenced the purchase price of said cans; that the transaction involving said sale of cans was unlawful, in that, Plaintiff in the course of such transaction and while engaged in commerce among the several states, sold goods, to-wit, cans, in a part of the United States, to-wit, Texas, [fol. 9] at prices lower than those exacted by said Plaintiff elsewhere in the United States of America, to-wit, Florida, for the purpose of destroying competition or eliminating Plaintiff's competition in such part of the United States, in violation of Section 13a, Title 15, United States Code; therefore, the consideration for said notes is illegal and said notes void and of no force and effect.

Fifth Plea

For a fifth plea to the first and second counts of Plaintiff's declaration, Defendant says that the promissory notes described in said first and second counts were given by the Defendant as a part of a transaction involving the sale of cans by the Plaintiff to the Defendant, and that said notes evidenced the purchase price of said cans; that at the time of the signing of said notes a controversy existed between the Plaintiff and the Defendant regarding certain adjust-

ments and credits claimed by the Defendant to be due it on account of discriminations made by the Plaintiff in the sale of cans, such discriminations consisting in selling cans to competitors of the Defendant at a lower price than it sold to the Defendant, and in granting said competitors of the Defendant certain discounts and allowances and furnishing them certain facilities, to-wit, can closing equipment, which it did not grant or furnish to the Defendant; that at the request of the Plaintiff said notes were delivered as evidence of the amount due the Plaintiff by the Defendant before such adjustments were taken into consideration or made; that the said promissory notes were given by the Defendant to the Plaintiff upon the prior express condition and understanding between the Plaintiff and the Defendant that the said notes would be paid when and at the time the said adjustments were made and that the said [fol. 10] notes would not be paid until the said adjustments were made; that the Plaintiff received said notes under the aforesaid understanding and agreement, and at the time of their receipt agreed to the conditions upon which the same were delivered as stated and further agreed with the Defendant that the notes should not become due until said adjustments were made; that the Plaintiff further agreed that said notes were never to be paid by the Defendant unless the adjustments should be made; that if said adjustments were never made said notes were not to be paid by the Defendant and to be void and of no effect; that said adjustments have never been made and that Plaintiff has, in fact, repudiated said agreement to make such adjustments.

Wherefore, Defendant says that the conditions under which these notes were delivered to the Plaintiff were never performed, and, therefore, said notes have never become binding obligations.

Sixth Plea

For a first plea to the third count of plaintiff's declaration, Defendant alleges that the Plaintiff did business in the States of Texas and Louisiana through a wholly owned subsidiary corporation known as the American Can Company Southern, which it controlled and operated and whose principal offices were identical with those of the Plaintiff, and that the transaction resulting in delivery of said promissory note described in said third count, grew out of a sale

of cans by the Plaintiff in Texas by, through and in the name of its said subsidiary, the note evidencing the purchase price of said cans. Defendant, therefore, denies that the Plaintiff became a bona fide holder of said note for a valuable consideration, in due course of trade without notice and [fol. 11] before maturity by virtue of the assignment of said note to it by its wholly owned and controlled subsidiary.

Defendant further alleges that the transaction involving said sale of cans, and in the course of which said note was given as evidence of the purchase price of said cans, was unlawful, in that, Plaintiff in the course of such transaction and while engaged in commerce among the several states, both in its own name and in the name of its said subsidiary, directly and indirectly discriminated in price between different purchasers of commodities, to-wit, cans, of like grade and quality, said commodities being sold for use and resale within the United States of America and where the effect of such discriminations was substantially to lessen competition or tend to create a monopoly in the particular line of commerce in which the Defendant was and is engaged and to injure, destroy and prevent competition with certain customers of said Defendant in violation of paragraph (a) of Section 13 of Title 15, United States Code; therefore, the consideration for said note is illegal and said note void and of no force and effect.

Seventh Plea

For a second plea to the third count of Plaintiff's declaration, Defendant alleges that the Plaintiff did business in the State of Texas and Louisiana through a wholly owned subsidiary corporation known as the American Can Company Southern, which it controlled and operated, and whose principal offices were identical with those of the Plaintiff, and that the transaction resulting in delivery of said promissory note described in said third count, grew out of a sale of cans by the Plaintiff in Texas by, through and in the name of its said subsidiary, the note evidencing the purchase price of said cans. Defendant, therefore, denies that [fol. 12] the Plaintiff became a bona fide holder of said note for a valuable consideration, in due course of trade without notice and before maturity by virtue of the assignment of said note to it by its wholly owned and controlled subsidiary.

Defendant further alleges that the transaction involving said sale of cans, and in the course of which said note was given as evidence of the purchase price of said cans, was unlawful, in that, Plaintiff in the course of such transaction and while engaged in commerce among the several states, both in its own name and in the name of its said subsidiary, discriminated in favor of certain purchasers of a commodity, to-wit, cans, and against the Defendant, a competitor of such purchasers, which cans were bought for resale in interstate commerce by furnishing to such purchasers certain facilities, to-wit, equipment for the closing of cans, referred to in the trade as "closing equipment," without cost or charge to said purchasers, and while charging rent for said equipment furnished to the Defendant, in violation of paragraph (e) of Section 13, Title 15, United States Code; therefore, the consideration for said note is illegal and said note void and of no force and effect.

Eighth Plea

For a third plea to the third count of Plaintiff's declaration, Defendant alleges that the Plaintiff did business in the States of Texas and Louisiana through a wholly owned subsidiary corporation known as the American Can Company Southern, which it controlled and operated and whose principal offices were identical with those of the Plaintiff, and that the transaction resulting in delivery of said promis- [fol. 13] sory note described in said third count, grew out of a sale of cans by the Plaintiff in Texas by, through and in the name of its said subsidiary, the note evidencing the purchase price of said cans. Defendant, therefore, denies that the Plaintiff became a bona fide holder of said note for a valuable consideration, in due course of trade without notice and before maturity by virtue of the assignment of said note to it by its wholly owned and controlled subsidiary.

Defendant further alleges that the transaction involving said sale of cans, and in the course of which said note was given as evidence of the purchase price of said cans, was unlawful, in that, Plaintiff in the course of such transaction and while engaged in commerce among the several states, both in its own name and in the name of its said subsidiary, sold cans which discriminated to its knowledge against competitors of such purchasers, in that, discounts were granted to such purchasers over and above any discounts available at the time of such transaction to said

competitors, namely, the Defendant and others similarly situated in respect of the sale of goods, to-wit, cans, of like grade, quality and quantity, in violation of Section 13a of Title 15, United States Code.

Defendant alleges more particularly that there is located in the State of Texas a canning plant of Stokely Bros. & Co., Inc., which said plant cans juices in Texas, and that as a part of the transaction heretofore mentioned, did sell the same throughout the United States in competition with the Defendant; that the Defendant likewise operates a large canning plant located in Texas; that the Plaintiff since June, 1936, has allowed said competitor of the Defendant on the cans purchased from the Plaintiff, manufactured in [fol. 14] Plaintiff's Texas plant in the name of its said subsidiary and used by said competitor in canning juices in Texas, a large and discriminatory discount, which, according to the information and belief of Defendant, is Five per cent (5%), and which discount the Plaintiff would not and did not allow Defendant on cans manufactured in said Texas plant of the Plaintiff and purchased by the Defendant.

Defendant further alleges that the following corporations, to-wit, California Packing Corporation, Stokely Bros. & Co., Inc., Hawaiian Pineapple Company, Ltd., Libby, McNeill & Libby, Inc. and The Great Atlantic and Pacific Tea Company, are large canners of juices, whose products are canned and sold throughout the United States in direct competition with the juices manufactured and canned by the Defendant; that on the purchase price of cans purchased by said above named corporations and each of them, the Plaintiff has, since June, 1936, allowed large and discriminatory discounts, which, to the best of Defendant's information and belief, are between Three percent (3%) and Five percent (5%), which said discounts the Plaintiff would not and did not allow the Defendant on cans purchased by it from the Plaintiff.

That such transactions are unlawful and in violation of the aforesaid Section of the United States Code, therefore, the consideration for said note is illegal and said note void and of no force and effect.

Ninth Plea

For a fourth plea to the third count of Plaintiff's declaration, Defendant alleges that the Plaintiff did business in the States of Texas and Louisiana through a wholly owned

subsidiary corporation known as the American Can Company Southern, which it controlled and operated and whose principal offices were identical with those of the Plaintiff, and that the transaction resulting in delivery of said pro- [fol. 15] missory note described in said third count, grew out of a sale of cans by the Plaintiff in Texas, by, through and in the name of its said subsidiary, the note evidencing the purchase price of said cans. Defendant, therefore, denies that the Plaintiff became a bona fide holder of said note for a valuable consideration, in due course of trade without notice and before maturity by virtue of the assignment of said note to it by its wholly owned and controlled subsidiary.

Defendant further alleges that the transaction involving said sale of cans, and in the course of which said note was given as evidence of the purchase price of said cans, was unlawful, in that, Plaintiff in the course of such transaction and while engaged in commerce among the several states, sold goods, to-wit, cans in a part of the United States, to-wit, Texas, at prices lower than those exacted by said Plaintiff elsewhere in the United States of America, to-wit, Florida, for the purpose of destroying competition or eliminating Plaintiff's competition in such part of the United States, in violation of Section 13a, Title 15, United States Code; therefore, the consideration for said note is illegal and said note void and of no force and effect.

Tenth Plea

For a fifth plea to the third count of Plaintiff's declaration, Defendant alleges that the Plaintiff did business in the States of Texas and Louisiana through a wholly owned subsidiary corporation known as the American Can Company Southern, which it controlled and operated and whose principal offices were identical with those of the Plaintiff, and that the transaction resulting in delivery of said promissory note described in said third count, grew out of a sale of cans by the Plaintiff in Texas, by, through and in [fol. 16] the name of its said subsidiary, the note evidencing the purchase price of said cans. Defendant, therefore, denies that the Plaintiff became bona fide holder of said note for a valuable consideration, in due course of trade without notice and before maturity by virtue of the assignment of said note to it by its wholly owned and controlled subsidiary.

Defendant further alleges that at the time of the signing of said note a controversy existed between the Plaintiff and the Defendant regarding certain adjustments and credits claimed by the Defendant to be due it on account of discriminations made by the Plaintiff in its own name and in the name of its said subsidiary in the sale of cans, such discriminations consisting in selling cans to competitors of the Defendant at a lower price than it sold to the Defendant, and in granting said competitors of the Defendant certain discounts and allowances and furnishing them certain facilities, to-wit, can closing equipment, which it did not grant or furnish to the Defendant; that at the request of the plaintiff said note was delivered as evidence of the amount due the Plaintiff by the Defendant before such adjustments were taken into consideration or made; that the said promissory note was given by the Defendant to the said subsidiary acting for and on behalf of the Plaintiff, upon the prior express condition and understanding between the Plaintiff and the Defendant that the said note would be paid when and at the time the said adjustments were made and that the said note would not be paid until the said adjustments were made; that the said subsidiary acting for and on behalf of the Plaintiff received said note under the aforesaid understanding and agreement, and at the time of its receipt agreed to the conditions upon which the same was delivered as stated, and further agreed with the Defendant that the note should not become due until [fol. 17] said adjustments were made; that the Plaintiff further agreed that said note was never to be paid by the Defendant unless the adjustments should be made; that if said adjustments were never made, said note was not to be paid by the Defendant and to be void and of no effect; that said adjustments have never been made and that Plaintiff has, in fact, repudiated said agreement to make such adjustments.

Wherefore, Defendant says that the conditions under which this note was delivered to the Plaintiff's said subsidiary acting for and on behalf of the plaintiff, were never performed, and, therefore, said note has never become a binding obligation.

Cody Fowler, Attorney for Defendant.

*Duly sworn to by J. Adams Bruce. Jurat omitted in printing.*

IN CIRCUIT COURT OF HILLSBOROUGH COUNTY

On the 20th day of November, 1942, in Law Action No. 23454, Demurrer to Amended Pleas was filed in words and figures as follows:

DEMURRER TO AMENDED PLEAS

The plaintiff, American Can Company, a New Jersey corporation, by its undersigned attorney, says that the Amended Pleas of the defendant filed herein November 6, [fol. 18] 1942, are bad in substance, and insufficient in law to be answered unto, and for substantial matters of law intended to be argued, assigns the following grounds:

As to All Pleas

1. Said pleas, and each of them, are conclusions of law, and no ultimate facts are pleaded to support the same.

2. Said pleas, and each of them, do not present any defense in bar of the plaintiff's action.

As to First Plea

1. Said plea fails to set forth the names and residences of the several purchasers of commodities with whom it is alleged the plaintiff discriminated against the defendant, and the place or places and time or times where and when such alleged discriminations are alleged to have occurred, nor the particulars of the nature of the several transactions alleged to constitute discriminations.

2. Said plea fails to allege the date and amount of the notes given at the time of the transaction alleged.

3. Said plea refers to cans "of like grade and quality" but fails to describe the same accurately, setting forth quantities purchased, points of origin, points of delivery, and other essential particulars required to advise the plaintiff sufficiently of the matters relied upon by defendant in order for plaintiff to meet or plead to the same.

4. Said plea fails to allege ultimate facts to support the allegation that the actions lessened competition or created a monopoly.

5. Said plea fails to allege whether any difference in price was due to difference in cost of manufacture, sale or

delivery resulting from differing methods or quantities in which commodities were alleged to have been sold by the plaintiff.

6. Said plea does not allege whether any price differential complained of was in response to changing conditions affecting the market for or marketability of the goods concerned.

7. Said plea fails to allege the times of the happenings complained of and the date of enactment of the statute relied upon.

[fol. 19] As to Second Plea

1. Said plea fails to set forth the names and residences of the several purchasers of commodities with whom it is alleged the plaintiff discriminated against the defendant, and the place or places and time or times where and when such alleged discriminations are alleged to have occurred, nor the particulars of the nature of the several transactions alleged to constitute discrimination.

2. Said plea fails to allege that the closing equipment alleged to have been furnished was of benefit or value to the purchasers to whom it is alleged to have been furnished or that the same was used by them.

3. Said plea fails to allege the amount of rent charged by plaintiff to defendant, or that defendant paid same.

4. Said plea fails to allege the times of the happenings complained of and the date of enactment of the statute relied upon.

As to Third Plea

1. Said plea fails to set forth the time of the transaction when cans were sold by plaintiff to defendant.

2. Said plea fails to set forth the amount of the purchase price of cans sold by plaintiff to defendant.

3. Said plea fails to allege the time of the happenings complained of and the time of the enactment of Section 13(a) of Title 15, United States Code, relied upon by the defendant to avoid payment of the notes herein sued upon.

4. Said plea does not allege facts showing that the statute relied upon was in force and effect at the time the in-

debtedness herein sued upon was created, or whether such indebtedness accrued subsequent thereto.

5. The said defendant seeks to plead upon information and belief without disclosing the sources thereof, thus preventing the plaintiff from replying to or meeting such pleading.

[fol. 20] 6. Said plea fails to set forth the names and residences of the several purchasers of commodities with whom it is alleged the plaintiff discriminated against the defendant, and the place or places and time or times where and when such alleged discriminations are alleged to have occurred, nor the particulars of the nature of the several transactions alleged to constitute discriminations.

7. The second paragraph of said plea fails to allege whether any of the discounts alleged to have been allowed to defendant's competitors were on like cans to those sold to the defendant.

8. The said plea fails to allege whether any difference in price was due to difference in cost of manufacture, sale or delivery resulting from differing methods or quantities in which commodities were alleged to have been sold by the plaintiff.

9. The said plea does not allege whether any price differential complained of was in response to changing conditions affecting the market for or marketability of the goods concerned.

10. The said plea fails to allege the times of the happenings complained of and the date of enactment of the statute relied upon.

As to Fourth Plea

1. The said plea fails to set forth the names and residences of the several purchasers of commodities with whom it is alleged the plaintiff discriminated against the defendant, and the place or places and time or times where and when such alleged discriminations are alleged to have occurred, nor the particulars of the nature of the several transactions alleged to constitute discriminations.

2. The said plea fails to set forth the date of the trans-
[fol. 21] action between defendant and plaintiff therein mentioned.

3. The said plea fails to allege the date and the amount of the notes given at the time of the transaction alleged.

4. The said plea fails to set forth whether the goods alleged to have been sold by plaintiff in Texas at prices lower than in Florida were of like grade and quality, in similar quantities, of the same size, etc. and fails to allege essential particulars required to advise the plaintiff sufficiently to plead thereto.

5. The said plea fails to allege ultimate facts to support the allegation that the actions lessened competition or created a monopoly.

6. The said plea fails to allege whether any difference in price was due to difference in cost of manufacture, sale or delivery resulting from differing methods or quantities in which commodities were alleged to have been sold by the plaintiff.

7. The said plea does not allege whether any price differential complained of was in response to changing conditions affecting the market for or marketability of the goods concerned.

8. The said plea fails to allege the times of the happenings complained of and the date of enactment of the statute relied upon.

As to Fifth Plea

1. The said plea fails to allege the date and amount of the notes given at the time of the transaction alleged.

2. The said plea fails to allege whether defendant has paid any part of principal and interest on said notes since date of such original purchase.

3. The said plea fails to set forth the names and residences of the several purchasers of commodities with whom it is alleged the plaintiff discriminated again defendant, and the place or places and time or times where and when [fol. 22] such alleged discriminations are alleged to have occurred, nor the particulars of the nature of the several transactions alleged to constitute discriminations.

4. The said plea fails to allege that the closing equipment was of benefit or value to the purchasers to whom it is alleged to have been furnished.

5. The said plea fails to allege that any such closing equipment was used by the parties to whom it was alleged to have been furnished, and the dates of such use.

6. The said plea fails to allege the name of the agent or representative of the plaintiff with whom the defendant had the alleged understanding of conditional delivery of the notes.

7. The said plea fails to allege whether the alleged prior expressed condition and understanding of delivery of the notes was verbal or written; and if verbal, the terms of same; and if written, to set forth the terms thereof or attach a true copy thereof.

8. The said plea does not set forth the facts to support the conclusion of law that the plaintiff received the notes under the alleged understanding and agreement, by setting forth the name of the person taking actual receipt of said notes and making the agreement alleged.

9. The said plea fails to allege the name of the person or persons alleged to have agreed for the plaintiff that the notes were never to be paid by the defendant unless the alleged adjustments were made.

10. The said plea fails to set forth the time and place of such agreement described in ground 9 hereinabove.

As to Sixth Plea

1. The said plea fails to set forth the names and residences of the several purchasers of commodities with whom it is alleged the plaintiff discriminated against the defend-[fol. 23] ant, and the place or places and time or times where and when such alleged discriminations are alleged to have occurred, nor the particulars of the nature of the several transactions alleged to constitute discriminations.

2. The said plea fails to set forth the date of the transaction between defendant and plaintiff therein mentioned.

3. The said plea refers to cans "of like grade and quality" but fails to describe the same accurately, setting forth quantities purchased, points of origin, points of delivery, and other essential particulars required to advise the plaintiff sufficiently of the matters relied upon by the defendant in order for the plaintiff to meet or plead to the same.

4. The said plea fails to allege ultimate facts to support the allegation that the actions lessened competition or created a monopoly.

5. The said plea fails to allege whether any difference in price was due to difference in cost of manufacture, sale or delivery resulting from differing methods or quantities in which commodities were alleged to have been sold by the plaintiff.

6. The said plea does not allege whether any price differential complained of was in response to changing conditions affecting the market for or market ability of the goods concerned.

7. The said plea fails to allege the times of the happenings complained of and the date of enactment of the statute relied upon.

As to Seventh Plea

1. The said plea fails to set forth the names and residences of the several purchasers of commodities with whom [fol. 24] it is alleged the plaintiff discriminated against the defendant, and the place or places and time or times where and when such alleged discriminations are alleged to have occurred, nor the particulars of the nature of the several transactions alleged to constitute discriminations.

2. The said plea fails to allege that the closing equipment alleged to have been furnished was of benefit or value to the purchasers to whom it is alleged to have been furnished, or that the same was used by them.

3. The said plea fails to allege the amount of rent charged by plaintiff to defendant, or that defendant paid same.

4. The said plea fails to allege the date of the transaction between plaintiff and defendant.

5. The said plea fails to allege ultimate facts to support the allegation that the actions lessened competition or created a monopoly.

6. The said plea fails to allege the times of the happenings complained of and the date of enactment of the statute relied upon.

As to Eighth Plea

1. The said plea fails to set forth the time of the transaction when cans were sold by plaintiff to defendant.

2. The said plea fails to allege the time of the happenings complained of and the time of the enactment of Section 13(a) of Title 15, United States Code, relied upon by the defendant to avoid payment of the notes herein sued upon.

3. The said plea does not allege facts showing that the statute relied upon was in force and effect at the time the indebtedness herein sued upon was created, or whether such indebtedness accrued subsequent thereto.

[fol. 25] 4. The said defendant seeks to plead upon information and belief without disclosing the sources thereof, thus preventing the plaintiff from replying to or meeting such pleading.

5. The said plea fails to set forth the names and residences of the several purchasers of commodities with whom it is alleged the plaintiff discriminated against the defendant, and the place or places and time or times where and when such alleged discriminations are alleged to have occurred, nor the particulars of the nature of the several transactions alleged to constitute discrimination.

6. The third paragraph of said plea fails to allege whether any of the discounts alleged to have been allowed to defendant's competitors were on like cans to those sold to the defendant.

7. The said plea fails to allege whether any difference in price was due to difference in cost of manufacture, sale or delivery resulting from differing methods or quantities in which commodities were alleged to have been sold by the plaintiff.

8. The said plea does not allege whether any price differential complained of was in response to changing conditions affecting the market for or marketability of the goods concerned.

9. The said plea fails to allege the times of the happenings complained of and the date of enactment of the statute relied upon.

As to Ninth Plea

1. The said plea fails to set forth the names and residences of the several purchasers of commodities with whom it is alleged the plaintiff discriminated against the defendant, and the place or places and time or times where and [fol. 26] when such alleged discriminations are alleged to have occurred, nor the particulars of the nature of the several transactions alleged to constitute discriminations.

2. The said plea fails to set forth the date of the transaction between defendant and plaintiff therein mentioned.

3. The said plea fails to set forth whether the goods alleged to have been sold by plaintiff in Texas at prices lower than in Florida were of like grade and quality, in similar quantities of the same size, etc. and fails to allege essential particulars required to advise the plaintiff sufficiently to plead thereto.

4. The said plea fails to allege ultimate facts to support the allegation that the actions lessened competition or created a monopoly.

5. The said plea fails to allege whether any difference in price was due to difference in cost of manufacture, sale or delivery resulting from differing methods or quantities in which commodities were alleged to have been sold by the plaintiff.

6. The said plea does not allege whether any price differential complained of was in response to changing conditions affecting the market for or marketability of the goods concerned.

7. The said plea fails to allege the times of the happenings complained of and the date of enactment of the statute relied upon.

As to Tenth Plea

1. The said plea fails to set forth the date of the transaction between defendant and plaintiff, or plaintiff's subsidiary, therein mentioned.

2. The said plea fails to allege the date and amount of the notes given at the time of the transaction alleged.

[fol. 27] 3. The said plea fails to allege whether defendant has paid any part of principal and interest on said notes since date of such original purchase.

4. The said plea fails to set forth the names and residences of the several purchasers of commodities with whom it is alleged the plaintiff, or plaintiff's subsidiary, discriminated against the defendant, and the place or places and time or times where and when such alleged discriminations are alleged to have occurred, nor the particulars of the nature of the several transactions alleged to constitute discriminations.

5. The said plea fails to allege that the closing equipment alleged to have been furnished was of benefit or value to the purchasers to whom it is alleged to have been furnished or that the same was used by them.

6. The said plea fails to allege the name of the agent or representative of the plaintiff, or plaintiff's subsidiary, with whom the defendant had the alleged understanding of conditional delivery of the notes.

7. The said plea fails to allege whether the alleged prior expressed condition and understanding of delivery of the notes was verbal or written; and if verbal, the terms of same; and if written, to set forth the terms thereof or attach a true copy thereof.

8. The said plea does not set forth the facts to support the conclusion of law that the plaintiff, or plaintiff's subsidiary, received the notes under the alleged understanding and agreement by setting forth the name of the person taking actual receipt of said notes and making the agreement alleged.

9. The said plea fails to allege the name of the person or [fol. 28] persons alleged to have agreed for the plaintiff, or plaintiff's subsidiary, that the notes were never to be paid by the defendant unless the alleged adjustments were made.

10. The said plea fails to set forth the time and place of such agreement described in ground 9 hereinabove.

John M. Allison, Attorney for Plaintiff.

IN CIRCUIT COURT OF HILLSBOROUGH COUNTY

On November 20, 1942, in Law Action No. 23454, Motion for Compulsory Amendment of Amended Pleas was filed in words and figures as follows:

MOTION FOR COMPULSORY AMENDMENT OF AMENDED PLEAS

The plaintiff, American Can Company, a New Jersey corporation, by its undersigned attorney, says that the amended pleas of the defendant filed herein November 6, 1942, are so framed as to prejudice, embarrass or delay a fair trial of this action in the following particulars.

As to First Plea

1. The said plea is a conclusion of law and no ultimate facts are pleaded to support the same.

2. The said plea fails to set forth the names of the several purchasers of commodities with whom it is alleged the plaintiff discriminated against the defendant.

3. The said plea fails to set forth the residence of the several purchasers of commodities with whom it is alleged the plaintiff discriminated against the defendant.

4. The said plea fails to set forth the dates or times of the alleged discriminations.

5. The said plea fails to set forth the place or places where the alleged discriminations are alleged to have occurred.

[fol. 29] 6. The said plea fails to set forth the particulars of the nature of the several transactions alleged to constitute discriminations against the defendant.

7. The said plea fails to set forth the date of the transaction between defendant and plaintiff therein mentioned.

8. The said plea fails to allege the date and amount of the notes given at the time of the transaction alleged.

9. The said plea refers to cans "of like grade and quality" but fails to describe the same accurately, setting forth quantities purchased, points of origin, points of delivery, and other essential particulars required to advise the plaintiff sufficiently of the matters relied upon by defendant in order for plaintiff to meet or plead to the same.

10. The said plea fails to allege ultimate facts to support the allegation that the actions lessened competition or created a monopoly.

11. The said plea fails to allege whether any difference in price was due to difference in cost of manufacture, sale or delivery resulting from differing methods or quantities in which commodities were alleged to have been sold by the plaintiff.

12. The said plea does not allege whether any price differential complained of was in response to changing conditions affecting the market for or marketability of the goods concerned.

13. The said plea fails to allege the names of the several states wherein the plaintiff was engaged in commerce.

14. The said plea fails to allege the times of the happenings complained of and the date of enactment of the stat- [fol. 30] ute relied upon.

As to Second Plea

1. The said plea is a conclusion of law and no ultimate facts are pleaded to support the same.

2. The said plea fails to set forth the names of the several purchasers, competitors of defendant, to whom it is alleged the plaintiff furnished closing equipment.

3. The said plea fails to set forth the residences of the several purchasers of commodities with whom it is alleged the plaintiff discriminated against the defendant.

4. The said plea fails to set forth the dates or times of the alleged discriminations.

5. The said plea fails to set forth the place or places where the alleged discriminations are alleged to have occurred.

6. The said plea fails to set forth the particulars of the nature of the several transactions alleged to constitute discriminations against the defendant.

7. The said plea fails to allege that the closing equipment was of benefit or value to the purchasers to whom it is alleged to have been furnished.

8. The said plea fails to allege that any such closing equipment was used by the parties to whom it was alleged to have been furnished and the dates of such use.

9. The said plea fails to allege the amount of rent charged by plaintiff to defendant, if any.

10. The said plea fails to allege the defendant paid any rent for such closing equipment.

11. The said plea fails to allege the date of the transaction between plaintiff and defendant.

12. The said plea fails to allege the date of the notes given at the time of such transaction and the amount thereof.

[fol. 31] 13. The said plea fails to allege ultimate facts to support the allegation that the actions lessened competition or created a monopoly.

14. The said plea fails to allege the names of the several states wherein the plaintiff was engaged in commerce.

15. The said plea fails to allege the times of the happenings complained of and the date of enactment of the statute relied upon.

As to Third Plea

1. The said plea is a conclusion of law and no ultimate facts are pleaded to support the same.

2. The said plea fails to set forth the time of the transaction when cans were sold by plaintiff to defendant.

3. The said plea fails to set forth the amount of the purchase price of cans sold by plaintiff to defendant.

4. The said plea fails to allege the time of the happenings complained of and the time of the enactment of Section 13 (a) of Title 15, United States Code, relied upon by the defendant to avoid payment of the notes herein sued upon.

5. The second paragraph of said plea alleges that the California Packing Corporation and Stokely Bros. & Company, Inc. sold something somewhere in competition with the defendant, but such allegation is not shown to be connected in any way with the happenings complained of.

6. The said plea does not allege facts showing that the statute relied upon was in force and effect at the time the indebtedness herein sued upon was created, or whether such indebtedness accrued subsequent thereto.

7. The said defendant seeks to plead upon information and belief without disclosing the sources thereof, thus preventing the plaintiff from replying to or meeting such pleading.

[fol. 32] 8. The first paragraph of said plea fails to set forth the names of the several purchasers of commodities with whom it is alleged the plaintiff discriminated against the defendant.

9. The first paragraph of said plea fails to set forth the residences of the several purchasers of commodities with whom it is alleged the plaintiff discriminated against the defendant.

10. The first paragraph of said plea fails to set forth the dates or times of the alleged discriminations.

11. The first paragraph of said plea fails to set forth the place or places where the alleged discriminations are alleged to have occurred.

12. The first paragraph of said plea fails to set forth the particulars of the nature of the several transactions alleged to constitute discriminations against the defendant.

13. The second paragraph of said plea fails to allege whether any of the discounts alleged to have been allowed to defendant's competitors were on like cans to those sold to the defendant.

14. The second paragraph of said plea fails to allege the dates of the transactions complained of.

15. The second paragraph of said plea fails to allege the particulars of the nature of the several transactions alleged to constitute discriminations against the defendant.

16. The third paragraph of said plea fails to allege the residences of the several purchasers of commodities with whom it is alleged the plaintiff discriminated against the defendant.

17. The third paragraph of said plea fails to set forth the dates or times of the alleged discriminations.

18. The third paragraph of said plea fails to set forth the place or places where the alleged discriminations are [fol. 33] alleged to have occurred.

19. The third paragraph of said plea fails to set forth the particulars of the nature of the several transactions alleged to constitute discrimination against the defendant.

20. The third paragraph of said plea fails to allege whether any of the discounts alleged to have been allowed to defendant's competitors were on like cans to those sold to defendant.

21. The fourth paragraph of said plea fails to allege the place or places where cans were delivered to defendant's competitors.

22. The fourth paragraph of said plea fails to set forth the residences of the several purchasers of commodities with whom it is alleged the plaintiff discriminated against the defendant.

23. The fourth paragraph of said plea fails to set forth the dates or times of the alleged discriminations.

24. The fourth paragraph of said plea fails to set forth the place or places where the alleged discriminations are alleged to have occurred.

25. The fourth paragraph of said plea fails to set forth the particulars of the nature of the several transactions alleged to constitute discriminations against the defendant.

26. The fourth paragraph of said plea fails to allege that the cans alleged to have been delivered to defendant's competitors were of like grade, quantity, size, weight, etc. with cans delivered to defendant.

27. The said plea fails to allege whether any difference in price was due to difference in cost of manufacture, sale or delivery resulting from differing methods or quantities [fol. 34] in which commodities were alleged to have been sold by the plaintiff.

28. The said plea does not allege whether any price differential complained of was in response to changing con-

ditions affecting the market for or marketability of the goods concerned.

29. The said plea fails to allege the times of the happenings complained of and the date of enactment of the statute relied upon.

As to Fourth Plea

1. The said plea is a conclusion of law and no ultimate facts are pleaded to support the same.

2. The said plea fails to set forth the names of the several purchasers of commodities with whom it is alleged the plaintiff discriminated against the defendant.

3. The said plea fails to set forth the residences of the several purchasers of commodities with whom it is alleged the plaintiff discriminated against the defendant.

4. The said plea fails to set forth the dates or times of the alleged discriminations.

5. The said plea fails to set forth the place or places where the alleged discriminations are alleged to have occurred.

6. The said plea fails to set forth the particulars of the nature of the several transactions alleged to constitute discriminations against the defendant.

7. The said plea fails to set forth the date of the transactions between defendant and plaintiff therein mentioned.

8. The said plea fails to allege the date and amount of the notes given at the time of the transaction alleged.

[fol. 35] 9. The said plea fails to set forth whether the goods alleged to have been sold by plaintiff in Texas at prices lower than in Florida were of like grade and quality, in similar quantities, of the same size, etc. and fails to allege essential particulars required to advise the plaintiff sufficiently to plead thereto.

10. The said plea fails to allege ultimate facts to support the allegation that the actions lessened competition or created a monopoly.

11. The said plea fails to allege whether any difference in price was due to difference in cost of manufacture, sale

or delivery resulting from differing methods or quantities in which commodities were alleged to have been sold by the plaintiff.

12. The said plea does not allege whether any price differential complained of was in response to changing conditions affecting the market for or marketability of the goods concerned.

13. The said plea fails to allege the names of the several states wherein the plaintiff was engaged in commerce.

14. The said plea fails to allege the times of the happenings complained of and the date of enactment of the statute relied upon.

As to Fifth Plea

1. The said plea is a conclusion of law and no ultimate facts are pleaded to support the same.

2. The said plea fails to set forth the date of the transaction between defendant and plaintiff therein mentioned.

3. The said plea fails to allege the date and amount of [fol. 36] the notes given at the time of the transaction alleged.

4. The said plea fails to allege whether defendant has paid any part of principal and interest on said notes since date of such original purchase.

5. The said plea fails to set forth the names of the competitors of defendant with whom it is alleged plaintiff discriminated against defendant.

6. The said plea fails to set forth the residences of the several competitors of defendant with whom it is alleged plaintiff discriminated against defendant.

7. The said plea fails to set forth the dates or times of the alleged discriminations.

8. The said plea fails to set forth the place or places where the alleged discriminations are alleged to have occurred.

9. The said plea fails to set forth the particulars of the nature of the several transactions alleged to constitute discriminations against the defendant.

10. The said plea fails to allege that the closing equipment was of benefit or value to the purchasers to whom it is alleged to have been furnished.

11. The said plea fails to allege that any such closing equipment was used by the parties to whom it was alleged to have been furnished, and the dates of such use.

12. The said plea fails to allege the name of the agent or representative of the plaintiff with whom the defendant had the alleged understanding of conditional delivery of the notes.

13. The said plea fails to allege whether the alleged prior expressed condition and understanding of delivery of the notes was verbal or written; and if verbal, the terms of [fol. 37] same; and if written, to set forth the terms thereof or attach a true copy thereof.

14. The said plea does not set forth the facts to support the conclusion of law that the plaintiff received the notes under the alleged understanding and agreement by setting forth the name of the person taking actual receipt of said notes and making the agreement alleged.

15. The said plea fails to allege the name of the person or persons alleged to have agreed for the plaintiff that the notes were never to be paid by the defendant unless the alleged adjustments were made.

16. The said plea fails to set forth the time and place of such agreement described in ground 15 hereinabove.

As to Sixth Plea

1. The said plea is a conclusion of law and no ultimate facts are pleaded to support the same.

2. The said plea fails to set forth the names of the several purchasers of commodities with whom it is alleged the plaintiff discriminated against the defendant.

3. The said plea fails to set forth the residences of the several purchasers of commodities with whom it is alleged the plaintiff discriminated against the defendant.

4. The said plea fails to set forth the dates or times of the alleged discriminations.

5. The said plea fails to set forth the place or places where the alleged discriminations are alleged to have occurred.

6. The said plea fails to set forth the particulars of the nature of the several transactions alleged to constitute discriminations against the defendant.

7. The said plea fails to set forth the date of the transaction between defendant and plaintiff therein mentioned.

8. The said plea fails to allege the date and amount of [fol. 38] the notes given at the time of the transaction alleged.

9. The said plea refers to cans "of like grade and quality" but fails to describe the same accurately, setting forth quantities purchased, points of origin, points of delivery, and other essential particulars required to advise the plaintiff sufficiently of the matters relied upon by the defendant in order for the plaintiff to meet or plead to the same.

10. The said plea fails to allege ultimate facts to support the allegation that the actions lessened competition or created a monopoly.

11. The said plea fails to allege whether any difference in price was due to difference in cost of manufacture, sale or delivery resulting from differing methods or quantities in which commodities were alleged to have been sold by the plaintiff.

12. The said plea does not allege whether any price differential complained of was in response to changing conditions affecting the market for or marketability of the goods concerned.

13. The said plea fails to allege the names of the several states wherein the plaintiff was engaged in commerce.

14. The said plea fails to allege the times of the happenings complained of and the date of enactment of the statute relied upon.

As to Seventh Plea

1. The said plea is a conclusion of law and no ultimate facts are pleaded to support the same.

2. The said plea fails to set forth the names of the several purchasers, competitors of defendant, to whom it is alleged the plaintiff furnished closing equipment.

3. The said plea fails to set forth the residences of the [fol. 39] several purchasers of commodities with whom it is alleged the plaintiff discriminated against the defendant.

4. The said plea fails to set forth the dates or times of the alleged discriminations.

5. The said plea fails to set forth the place or places where the alleged discriminations are alleged to have occurred.

6. The said plea fails to set forth the particulars of the nature of the several transactions alleged to constitute discriminations against the defendant.

7. The said plea fails to allege that the closing equipment was of benefit or value to the purchasers to whom it is alleged to have been furnished.

8. The said plea fails to allege that any such closing equipment was used by the parties to whom it was alleged to have been furnished and the dates of such use.

9. The said plea fails to allege the amount of rent charged by plaintiff to defendant, if any.

10. The said plea fails to allege the defendant paid any rent for such closing equipment.

11. The said plea fails to allege the date of the transaction between plaintiff and defendant.

12. The said plea fails to allege the date of the notes given at the time of such transaction and the amount thereof.

13. The said plea fails to allege ultimate facts to support the allegation that the actions lessened competition or created a monopoly.

14. The said plea fails to allege the names of the several states wherein the plaintiff was engaged in commerce.

[fol. 40] 15. The said plea fails to allege the times of the happenings complained of and the date of enactment of the statute relied upon.

As to the Eighth Plea

1. The said plea is a conclusion of law and no ultimate facts are pleaded to support the same.

2. The said plea fails to set forth the time of the transaction when cans were sold by plaintiff to defendant.

3. The said plea fails to set forth the amount of the purchase price of cans sold by plaintiff to defendant.

4. The said plea fails to allege the time of the happenings complained of and the time of the enactment of Section 13(a) of Title 15, United States Code, relied upon by the defendant to avoid payment of the notes herein sued upon.

5. The said plea does not allege facts showing that the statute relied upon was in force and effect at the time the indebtedness herein sued upon was created, or whether such indebtedness accrued subsequent thereto.

6. The said defendant seeks to plead upon information and belief without disclosing the sources thereof, thus preventing the plaintiff from replying to or meeting such pleading.

7. The first paragraph of said plea fails to set forth the names of the several purchasers of commodities with whom it is alleged the plaintiff discriminated against the defendant.

8. The first paragraph of said plea fails to set forth the residences of the several purchasers of commodities with whom it is alleged the plaintiff discriminated against the defendant.

[fol. 41] 9. The first paragraph of said plea fails to set forth the dates or times of the alleged discriminations.

10. The first paragraph of said plea fails to set forth the place or places where the alleged discriminations are alleged to have occurred.

11. The first paragraph of said plea fails to set forth the particulars of the nature of the several transactions alleged to constitute discriminations against the defendant.

12. The third paragraph of said plea fails to allege whether any of the discounts alleged to have been allowed

to defendant's competitors were on like cans to those sold to the defendant.

13. The second paragraph of said plea fails to allege the dates of the transactions complained of.

14. The second paragraph of said plea fails to allege the particulars of the nature of the several transactions alleged to constitute discriminations against the defendant.

15. The third paragraph of said plea fails to allege the residences of the several purchasers of commodities with whom it is alleged the plaintiff discriminated against the defendant.

16. The third paragraph of said plea fails to set forth the dates or times of the alleged discriminations.

17. The third paragraph of said plea fails to set forth the place or places where the alleged discriminations are alleged to have occurred.

18. The fourth paragraph of said plea fails to set forth the particulars of the nature of the several transactions alleged to constitute discriminations against the defendant.

[fol. 42] 19. The fourth paragraph of said plea fails to allege whether any of the discounts alleged to have been allowed to defendant's competitors were on like cans to those sold to defendant.

20. The fourth paragraph of said plea fails to allege the place or places where cans were delivered to defendant's competitors.

21. The said plea fails to allege whether any difference in price was due to difference in cost of manufacture, sale or delivery resulting from differing methods of quantities in which commodities were alleged to have been sold by the plaintiff.

22. The said plea does not allege whether any price differential complained of was in response to changing conditions affecting the market for or marketability of the goods concerned.

23. The said plea fails to allege the times of the happenings complained of and the date of enactment of the statute relied upon.

As to Ninth Plea

1. The said plea is a conclusion of law and no ultimate facts are pleaded to support the same.

2. The said plea fails to set forth the names of the several purchasers of commodities with whom it is alleged the plaintiff discriminated against the defendant.

3. The said plea fails to set forth the residences of the several purchasers of commodities with whom it is alleged the plaintiff discriminated against the defendant.

4. The said plea fails to set forth the dates or times of the alleged discriminations.

5. The said plea fails to set forth the place or places [fol. 43] where the alleged discriminations are alleged to have occurred.

6. The said plea fails to set forth the particulars of the nature of the several transactions alleged to constitute discriminations against the defendant.

7. The said plea fails to set forth the date of the transaction between defendant and plaintiff therein mentioned.

8. The said plea fails to allege the date and amount of the notes given at the time of the transaction alleged.

9. The said plea fails to set forth whether the goods alleged to have been sold by plaintiff in Texas at prices lower than in Florida were of like grade and quality, in similar quantities, of the same size, etc. and fails to allege essential particulars required to advise the plaintiff sufficiently to plead thereto.

10. The said plea fails to allege ultimate facts to support the allegation that the actions lessened competition or created a monopoly.

11. The said plea fails to allege whether any difference in price was due to difference in cost of manufacture, sale or delivery resulting from differing methods or quantities in which commodities were alleged to have been sold by the plaintiff.

12. The said plea does not allege whether any price differential complained of was in response to changing con-

ditions affecting the market for or mark ability of the goods concerned.

13. The said plea fails to allege the names of the several states wherein the plaintiff was engaged in commerce.

14. The said plea fails to allege the times of the happenings complained of and the date of enactment of the statute relied upon.

[fol. 44] As to Tenth Plea

1. The said plea is a conclusion of law and no ultimate facts are pleaded to support the same.

2. The said plea fails to set forth the date of the transaction between defendant and plaintiff, or plaintiff's subsidiary, therein mentioned.

3. The said plea fails to allege the date and amount of the notes given at the time of the transaction alleged.

4. The said plea fails to allege whether defendant has paid any part of principal and interest on said notes since date of such original purchase.

5. The said plea fails to set forth the names of the competitors of defendant with whom it is alleged plaintiff, or plaintiff's subsidiary, discriminated against defendant.

6. The said plea fails to set forth the residences of the several competitors of defendant with whom it is alleged plaintiff, or plaintiff's subsidiary, discriminated against defendant.

7. The said plea fails to set forth the dates or times of the alleged discriminations.

8. The said plea fails to set forth the place or places where the alleged discriminations are alleged to have occurred.

9. The said plea fails to set forth the particulars of the nature of the several transactions alleged to constitute discriminations against the defendant.

10. The said plea fails to allege that the closing equipment was of benefit or value to the purchasers to whom it is alleged to have been furnished.

11. The said plea fails to allege that any such closing [fol. 45] equipment was used by the parties to whom it was alleged to have been furnished, and the dates of such use.

12. The said plea fails to allege the name of the agent or representative of the plaintiff or plaintiff's subsidiary, with whom the defendant had the alleged understanding of conditional delivery of the notes.

13. The said plea fails to allege whether the alleged prior expressed condition and understanding of delivery of the notes was verbal or written; and if verbal, the terms of same; and if written, to set forth the terms thereof or attach a true copy thereof.

14. The said plea does not set forth the facts to support the conclusion of law that the plaintiff, or plaintiff's subsidiary, received the notes under the alleged understanding and agreement by setting forth the name of the person taking actual receipt of said notes and making the agreement alleged.

15. The said plea fails to allege the name of the person or persons alleged to have agreed for the plaintiff, or plaintiff's subsidiary, that the notes were never to be paid by the defendant unless the alleged adjustments were made.

16. The said plea fails to set forth the time and place of such agreement described in ground 15 hereinabove.

Wherefore, plaintiff respectfully moves the Court to strike the said pleas from the files or to compel the defendant to amend the same to meet the foregoing objections.

John M. Allison, Attorney for Plaintiff.

[fol. 46] In Circuit Court of Hillsborough County

On January 22, 1943, in Law Action No. 23454, Order Directing Pre-Trial Conference was entered and recorded in Circuit Court Minutes Book 86, page 22, in words and figures as follows:

Order Directing Pre-trial Conference

The above cause coming on to be heard on January 14th and January 16th, 1943, upon plaintiff's demurrer and mo-

tion for compulsory amendment, addressed to the amended pleas of the defendant, and the Court having heard argument of counsel for the parties at length, upon consideration of the premises:

The Court is of the opinion, that in its discretion, a pre-trial conference is necessary herein at this time to simplify the issues to be formulated, to determine the necessity or desirability of amending the pleadings, to obtain admissions of fact and of documents which will avoid unnecessary proof, to limit the number of witnesses, and for such other matters as may aid in disposing of this action; and that by order of both Judges of this Court entered June 21, 1940, pursuant to order of the Supreme Court of Florida entered January 12, 1940, this Court has authority and discretion to hold such pre-trial conference at this time.

It is therefore Considered, Ordered and Adjudged that before further proceedings in this cause a pre-trial conference be, and the same is hereby ordered, for the purpose of considering simplification of the issues, desirability of amendments to the pleadings, possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, the limitation of the number of witnesses, and [fol. 47] such other matters as may aid in the disposition of the above action; such pre-trial conference to be held without unnecessary delay after reasonable notice to counsel as hereinafter provided.

It is further Ordered that at such pre-trial conference, the parties hereto shall present to the Court material and relevant witnesses, records and documents in support of their pleadings filed or to be filed, and that either party hereto is authorized and empowered to take necessary depositions of material and relevant witnesses residing outside this County, and to propound interrogatories to officers, agents, or employees of the adversary party, after due notice thereof to opposing counsel, as provided by Section 90.17, Florida Statutes, 1941, and the rules of practice governing this Court. The purpose of such discovery and investigation shall be to simplify and determine the issues between the parties, and for the purposes hereinabove set forth.

It is further Ordered that counsel for the respective parties are directed to take any necessary depositions, and propound any interrogatories as herein provided promptly,

in order that such pre-trial conference may not be unreasonably delayed.

It is further Ordered that either party hereto shall have the right to interpose objections to proposed interrogatories before being required to answer the same, and this Court reserves the power to determine the relevancy, materiality and reasonableness of such interrogatories before the same are required to be answered.

It is further Ordered that this Court may fix the date of such pre-trial conference upon five days' notice to counsel for the parties, if, following the lapse of a reasonable time from the date of this order, the parties have not diligently proceeded to take such depositions; propound such inter- [fol. 48] rogatories, and obtain such proof to present at such pre-trial conference.

Done and Ordered at Chambers in Tampa, Florida, this 22nd day of January, A. D. 1943.

L. L. Parks, Circuit Judge.

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[fol. 49] In Circuit Court of Hillsborough County

On January 22, 1943, in Law Action No. 23569, Declaration was filed in words and figures as follows:

Declaration

The Plaintiff, American Can Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and duly authorized to transact business in the State of Florida, by its undersigned attorney, sues the Defendant, Bruce's Juices, Inc., a corporation organized and existing under the laws of the State of Florida, for that:

On to-wit, the 31st day of December, 1941, the said Defendant, by its promissory note of that date, now overdue, promised to pay to the order of the Plaintiff, at the office of the Plaintiff, 230 Park Avenue, New York, N. Y., the sum of Seventy-Five Thousand ($75,000.00) Dollars, one year after date, with interest at five percent per annum after November 30th, 1941, payable quarterly. That said note was in renewal of a promissory note executed and delivered by Defendant to Plaintiff in the sum of $75,000.00 dated August 31st, 1940, due December 31st, 1941, which latter

note was likewise a renewal of a portion of a prior note executed and delivered by Defendant to Plaintiff on June 14th, 1940, due August 31st, 1940, in the principal sum of $100,784.60. That the indebtedness due from Defendant to Plaintiff represented by said notes, and others executed and delivered prior thereto, was created prior to February 1st, 1940.

That the Defendant paid to Plaintiff the interest upon said note dated December 31, 1941 as therein provided, as follows: On March 31, 1942, in the sum of $937.50; on June 1st, 1942, in the sum of $958.33; on September 2, 1942 in the [fol. 50] sum of $958.33; and on December 4, 1942, in the sum of $947.92, which paid said interest upon said note to November 30, 1942. That the principal of said note matured on December 31st, 1942, but was not paid by Defendant, and there is now due, owing and unpaid to Plaintiff upon said note, the principal thereof in the sum of $75,000.00, together with interest thereon from December 1st, 1942 at the rate of 5% per annum until paid. And Plaintiff alleges that it is the owner and holder in good faith for value of said promissory note, and that the same is past due, owing and unpaid, as alleged.

Wherefore, Plaintiff sues Defendant and claims damages in the sum of One Hundred Thousand ($100,000.00) Dollars.

John M. Allison, Attorney for Plaintiff.

(Copy of Cause of Action Attached.)

(Copy of Cause of Action.)

#)30

City: Tampa. State: Florida.

Date: December 31st, 1941.

One (1) year after date we promise to pay to the order of American Can Company, Seventy-Five Thousand and 00/100ths $75,000.00 Payable at American Can Company, 230 Park Avenue, New York, N. Y. Value Received, with interest at 5 percent per annum after November 30th, 1941, payable quarterly.

Bruce's Juices, Inc., By: G. P. Peer, Ass't Treas.

No. ——. Due Dec. 31, 1942. AW. Renews #2762.

(Endorsements on Reverse Side.)

[fol. 51] For value received, —— hereby guarantees payment of the within note at maturity, or at any time there-

after, with interest at the rate of — per cent per annum until paid, and hereby waive presentment for payment, Protest and Notice of Protest.

Mar. 31, 1942—Paid Int. to 2-28-42, $937.50.
June 1, 1942—Paid Int. to May 31, 1942, $958.33.
Sep. 2, 1942—Paid Int. to Aug. 31, 1942, $958.33.
Dec. 4, 1942—Paid Int. to Nov. 30, 1942, $947.92.

IN CIRCUIT COURT OF HILLSBOROUGH COUNTY

In Law Action No. 23569, Pleas were filed on March 1, 1943, in words and figures as follows:

PLEAS

Comes now the Defendant, Bruce's Juices, Inc., by its attorney undersigned, and files this its pleas to the declaration of the Plaintiff filed herein, and says:

First Plea

For first plea to Plaintiff's declaration, that the promissory note described in said declaration and the note or notes which it purports to renew, were given by the Defendant as part of a transaction involving the sale of cans by the Plaintiff to the Defendant, and that said notes evidenced the purchase price of said cans; that the transaction involving said sale of cans was unlawful in that Plaintiff in the course of such transaction and while engaged in commerce among the several states directly and indirectly discriminated in price between different purchasers of commodities, to-wit, cans, of like grade and quality, said commodities being sold for use and re-sale within the United States of America and where the effect of such discriminations was substantially to lessen competition or tend to create a monop-ly in the particular line of commerce in [fol. 52] which the Defendant was and is engaged and to injure, destroy, and prevent competition with certain customers of said Plaintiff in violation of Paragraph (a) of Section 13 of Title 15, United States Code.

Defendant alleges more particularly that from June 19, 1936, and continuously through and after February 1, 1940, Plaintiff, while engaged in commerce and in the course thereof as aforesaid, sold and delivered cans of substantially the grade and quality as those purchased by

the Defendant from the Plaintiff and used in canning fruit and vegetable juices, to the corporations, and each of them, specified in Exhibit "A" attached hereto and by special reference made a part hereof, at lower prices than those charged to Defendant by the Plaintiff for cans of substantially the same grade and quality sold and delivered to Defendant by Plaintiff during the same period of time, the exact price, or prices, at which said cans were sold to said purchasers and the method by which said prices were fixed and the precise terms of such sales to such other purchasers being unknown to the Defendant but known to the Plaintiff, and which said cans were used by said purchasers in canning juices to be sold and delivered by them in interstate commerce in competition with the products of the Defendant which were canned and distributed in such commerce in cans purchased by it from the Plaintiff; therefore the consideration for the note sued on is illegal and said note void and of no force and effect.

Second Plea

For a second plea to the Plaintiff's declaration Defendant says that the promissory note described in said declaration and the note or notes which it purports to renew, were given by the Defendant as part of a transaction involving the sale of cans by the Plaintiff to the Defendant, and that [fol. 53] said notes evidenced the purchase price of said cans; that the transaction involving said sale of cans was unlawful, in that Plaintiff in the course of such transaction and while engaged in commerce among the several states, discriminated in favor of certain purchasers of a commodity, to-wit, cans, and against the Defendant, a competitor of such purchasers, which cans were bought by the Defendant from the Plaintiff for resale in interstate commerce by furnishing to such purchasers certain facilities and services connected with the processing, handling, sale and distribution of said cans, without cost or charge to said purchasers, and while charging rent for said equipment furnished to Defendant, in violation of Paragraph (e) of Section 13, Title 15, United States Code.

Defendant alleges more particularly that from June 19, 1936, and continuously through and after February 1, 1940, the Plaintiff while engaged in commerce and in the course thereof as aforesaid, furnished certain competi-

tors of Defendant, and each of them, whose names are set forth in Exhibit "B" attached hereto and by special reference made a part hereof, with equipment for the closing of cans, referred to in the trade as "closing equipment"; other facilities and services which were so furnished, and the manner in which they were furnished, and the precise terms on which any were furnished, are unknown to Defendant but known to the Plaintiff, but which said services and facilities were not accorded by the Plaintiff, to the Defendant as a purchaser of said cans on proportionally equal terms with such other purchasers competing in the distribution of such products in such commerce; therefore the consideration for the note sued on is illegal and said note void and of no force and effect.

[fol. 54] Third Plea

For a third plea to the Plaintiff's declaration Defendant says that the promissory note described in said declaration and the note or notes which it purports to renew were given by the Defendant as part of a transaction involving the sale of cans by the Plaintiff to the Defendant, and that said notes evidenced the purchase price of said cans; that the transaction involving said sale of cans was unlawful in that Plaintiff, in the course of such transactions and while engaged in commerce among the several states, sold cans which discriminated to its knowledge against competitors of such purchasers in that discounts and allowances were granted to such purchasers over and above any discounts and allowances available at the time of such transaction to said competitors, namely, the Defendant and others similarly situated in respect to the sale of goods, to-wit, cans of like grade, quality and quantity, in violation of Section 13a of Title 15, United States Code.

Defendant alleges more particularly that there are located in Tampa, Florida, canning plants of the corporations specified in Exhibit "C" attached hereto and by special reference made a part hereof, each of said plants canning juices in Tampa, and that as a part of the transaction heretobefore mentioned, did sell the same throughout the United States in competition with the Defendant; that the Defendant likewise operates a large canning plant located in Tampa; that the *that the* plaintiff since June,

1936, has allowed said competitors of the Defendant, on the cans purchased from the plaintiff and delivered in Tampa and used by said competitors in canning Juices in Tampa, a large and discriminatory discount, which ac- [fol. 55] cording to the information and belief of Defendant, is five percent (5%), and which discount the plaintiff would not and did not allow Defendant on cans purchased by Defendant from Plaintiff and delivered in Tampa; therefore the consideration for the note sued on is illegal and said note void and of no force and effect.

Fourth Plea

For a fourth plea to Plaintiff's declaration Defendant says that the promissory note described in said declaration and the note or notes which it purports to renew, were given by the Defendant as part of a transaction involving the sale of cans by the Plaintiff to the Defendant, and that said notes evidenced the purchase price of said cans; that the transaction involving said sale of cans was unlawful in that Plaintiff in the course of such transaction and while engaged in commerce among the several states, sold cans which discriminated to its knowledge against competitors of such purchasers in that, discounts and allowances were granted to such purchasers over and above any discounts and allowances available at the time of such transaction to said competitors, namely, the Defendant and others similarly situated in respect to the sale of goods, to-wit, cans, of like grade, quality and quantity, in violation of Section 13a of Title 15, United States Code.

Defendant alle , more particularly that the corporations specified in Exhibit "D" attached hereto and by special reference made a part hereof, are large canners of juices, whose products are canned and sold throughout the United States in direct competition with the juices manufactured and canned by the Defendant; that on the purchase price of cans purchased by said corporations, and each of them, the Plaintiff has, since June 1936, allowed large and discriminatory discounts, which to the [fol. 56] best of Defendant's information and belief, are between three percent (3%), and five percent (5%), which said discounts the Plaintiff would not and did not allow the Defendant on cans purchased by it from the Plaintiff;

therefore, the consideration for the note sued on is illegal and said note void and of no force and effect.

Fifth Plea

For a fifth plea to the Plaintiff's declaration, Defendant says that the promissory note described in said declaration and the note or notes which it purports to renew, were given by the Defendant as part of a transaction involving the sale of cans by the Plaintiff to the Defendant, and that said notes evidenced the purchase price of said cans; that the transaction involving said sale of cans was unlawful, in that Plaintiff, in the course of such transaction and while engaged in commerce among the several states, sold goods, to-wit, cans, in a part of the United States, to-wit, Texas, at prices lower than those exacted by said Plaintiff elsewhere in the United States, to-wit, Florida, for the purpose of destroying competition or eliminating Plaintiff's competitors in such part of the United States, said discriminations being committed by the Plaintiff from and after June, 1936, in violation of Section 13a of Title 15, United States Code; therefore the consideration for the note sued on is illegal and said note void and of no force and effect.

Sixth Plea

For a sixth plea to the Plaintiff's declaration, Defendant says that the promissory note described in said declaration and the note or notes which it purports to renew, were given by the Defendant as a part of a transaction involving the sale of cans by the Plaintiff to the Defend- [fol. 57] ant, and that said notes evidenced the purchase price of said cans; that at the time of the signing of said notes a controversy existed between the Plaintiff and the Defendant regarding certain adjustments and credits claimed by the Defendant to be due it on account of discriminations made by the Plaintiff in the sale of cans; that at the request of the Plaintiff said notes were delivered as evidence of the amount due the Plaintiff by the Defendant before such adjustments were taken into consideration or made; that the said promissory notes were given by the Defendant to the Plaintiff upon the prior express condition and understanding between the Plaintiff and the Defendant that the said notes would be paid when

and at the time the said adjustments were made and that the said notes would not be paid until the said adjustments were made; that the Plaintiff received said notes under the aforesaid understanding and agreement, and at the time of their receipt agreed to the conditions upon which the same were delivered as stated, and further agreed with the Defendant that the notes should not become due until said adjustments were made; that the Plaintiff further agreed that the said notes were never to be paid by the Defendant unless the adjustments should be made; that if said adjustments were never made, said notes were not to be paid by the Defendant and to be void and of no effect; that said adjustments have never been made and that Plaintiff has, in fact, repudiated said agreement to make such adjustments.

Wherefore, Defendant says that the conditions under which these notes were delivered to the Plaintiff were never performed, and, therefore, said notes have never become binding obligations.

Cody Fowler, Attorney for Defendant.

[fol. 57a] *Duly sworn to by J. Adams Bruce. Jurat omitted in printing.*

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[fol. 58] EXHIBIT "A"

Engelman Gardens, Edinboro, Texas.
Border Packing Company, Brownsville, Texas.
California Packing Corporation.
Stokely Brothers & Company, Inc.
Hawaiian Pineapple Company, Ltd.
Libby, McNeill & Libbey, Inc.
Morgan Packing Company.
The Great Atlantic & Pacific Tea Company.

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EXHIBIT "B"

California Packing Corporation.
Taormina Corporation.
Stokely Brothers & Company, Inc.
Morgan Packing Company.

EXHIBIT "C"

California Packing Corporation.
Stokely Brothers and Company, Inc.

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EXHIBIT "D"

California Packing Corporation.
Stokely Brothers & Company, Inc.
Hawaiian Pineapple Company, Ltd.
Morgan Packing Company.
Libbey, McNeill & Libbey, Inc.
The Great Atlantic & Pacific Tea Company.

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[fol. 59] IN CIRCUIT COURT OF HILLSBOROUGH COUNTY

On the 5th day of April, 1943, in Law Action No. 23569, Demurrer to Pleas was filed in words and figures as follows:

DEMURRER TO PLEAS

The plaintiff, American Can Company, a New Jersey corporation, by its undersigned attorney, says that the Pleas of the defendant filed herein March 1st, 1943, are bad in substance, and insufficient in law to be answered unto, and for substantial matters of law intended to be argued, assigns the following grounds:

As to All Pleas

1. The said pleas, and each of them, are conclusions of law, and no ultimate facts are set forth to support the same.

2. The said pleas, and each of them, fail to present any defense in bar of the plaintiff's action.

3. It affirmatively appears from the pleadings herein that the note sued upon is a renewal note, and by the execution and delivery thereof, the defendant has waived the defenses sought to be interposed.

4. It affirmatively appears that the defendant by said pleas seeks to interpose matters of defense exclusively cognizable in the United States Courts, and the Courts

of the State of Florida are without jurisdiction, to entertain the same.

As to First Plea

1. The said plea refers to cans of "substantially the same grade and quality", but fails to describe the same accurately, setting forth quantities purchased, points of origin and delivery, and other essential particulars required to advise the plaintiff sufficiently of the matters relied upon [fol. 60] by defendant in order for plaintiff to meet or plead to the same.

2. It affirmatively appears from said plea that defendant is without knowledge of the matters sought to be charged against plaintiff, and that said plea constitutes an attempt to plead mere suspicion contrary to law.

3. It affirmatively appears that the note sued upon is a renewal note, and the defendant has waived any defense of illegality sought to be interposed by said plea.

4. The said plea fails to set forth any facts to support the conclusion of the pleader that the effect of alleged discriminations was substantially to lessen competition or tend to create a monopoly.

5. The said plea fails to allege whether or not defendant has paid any part of principal or interest on said note.

As to Second Plea

1. It affirmatively appears from said plea that defendant is without knowledge of the matters sought to be charged against plaintiff, and that said plea constitutes an attempt to plead mere suspicion contrary to law.

2. It affirmatively appears that the note sued upon is a renewal note, and the defendant has waived any defense of illegality sought to be interposed by said plea.

3. Said plea fails to set forth any facts to support the conclusion of the pleader that the effect of alleged discriminations was substantially to lessen competition or tend to create a monopoly.

4. The said plea fails to allege that the closing equipment alleged to have been furnished to certain competitors of the defendant was of benefit of value to them or was used by them.

[fol. 61] 5. Said plea fails to allege the amount of rent charged by plaintiff to defendant, or that defendant paid the same.

6. The said plea fails to identify or allege what, if any, "other facilities and services" in addition to closing equipment, were furnished by plaintiff to defendant's competitors.

As to Third Plea

1. It affirmatively appears from said plea that defendant is without knowledge of the matters sought to be charged against plaintiff, and that said plea constitutes an attempt to plead mere suspicion contrary to law.

2. It affirmatively appears that the note sued upon is a renewal note, and the defendant has waived any defense of illegality sought to be interposed by said plea.

3. Said plea fails to set forth any facts to support the conclusion of the pleader that the effect of alleged discriminations was substantially to lessen competition or tend to create a monopoly.

4. Said plea fails to allege whether any of the discounts alleged to have been allowed by plaintiff to defendant's competitors were on like cans to those sold to defendant.

5. The said plea constitutes an attempt to plead upon information and belief without disclosing the sources of information, thereby preventing plaintiff from replying to or meeting such pleading.

6. The said plea fails to set forth the times of the happenings complained of and the particulars of the nature of the several transactions alleged to constitute discriminations against defendant.

As to Fourth Plea

1. It affirmatively appears from said plea that defend-
[fol. 62] ant is without knowledge of the matters sought to be charged against plaintiff, and that said plea constitutes an attempt to plead mere suspicion contrary to law.

2. It affirmatively appears that the note sued upon is a renewal note, and the defendant has waived any defense of illegality sought to be interposed by said plea.

3. Said plea fails to set forth any facts to support that conclusion of the pleader that the effect of alleged discriminations was substantially to lessen competition or tend to create a monopoly.

4. Said plea fails to allege whether any of the discounts alleged to have been allowed by plaintiff to defendant's competitors were on like cans to those sold to defendant.

5. The said plea constitutes an attempt to plead upon information and belief without disclosing the sources of information, thereby preventing plaintiff from replying to or meeting such pleading.

6. The said plea fails to set forth the times of the happenings complained of and the particulars of the nature of the several transactions alleged to constitute discriminations against defendant.

7. It does not affirmatively appear from said plea that the parties referred to are competitors of the defendant within the purview and intent of the United States Code referred to.

As to Fifth Plea

1. The said plea fails to allege the date and amount of the notes given at the time of the transaction alleged.

2. The said plea fails to allege whether the defendant has paid any part of principal and interest on said notes since date of said original purchase.

3. The said plea fails to set forth the names and residences of the several purchasers of commodities with whom [fol. 63] it is alleged the plaintiff discriminated against the defendant, and the place or places, and time or times, where, or when, such discriminations are alleged to have occurred, nor the particulars of the nature of the several transactions alleged to constitute discriminations.

4. The said plea fails to set forth whether the goods alleged to have been sold by plaintiff in Texas at prices lower than in Florida, were of like grade and quality in similar quantities and of the same size, and fails to allege essential particulars necessary to advise the plaintiff sufficiently to plead thereto.

5. The said plea fails to allege ultimate facts to support the allegation that the actions complained of lessened competition or created a monopoly.

6. It fails to appear from said plea whether any alleged sales by the plaintiff were to competitors of the defendant within the purview of the laws relied upon.

7. It affirmatively appears that the note sued upon is a renewal note and the defendant has waived any defense of illegality sought to be interposed by said plea.

As to Sixth Plea

1. The said plea fails to set forth the date and amount of the notes given at the time of the transaction alleged.

2. The said plea fails to allege whether the defendant has paid any part of principal and interest on said notes since the date of such original purchase.

3. Said plea fails to set forth the names and residences of the several purchasers of commodities with whom it is alleged the plaintiff discriminated against the defendant, [fol. 64] and the place or places, time or times, where or when, such alleged discriminations are alleged to have occurred, nor the particulars of the nature of the several transactions alleged to constitute discriminations.

4. The said plea fails to allege the name of the agent or representative of plaintiff with whom the defendant had the alleged understanding of conditional delivery of the notes referred to.

5. The said plea fails to allege whether the alleged prior expressed condition and understanding of delivery of the notes referred to was verbal or written, and if verbal, the terms of same, and if written, to set forth the terms thereof, or attach a true copy thereof.

6. The said plea fails to set forth the facts to support the conclusion of law that the plaintiff received the notes under the alleged understanding and agreement, by setting forth the name of the person taking actual receipt of said notes and making the agreement alleged.

7. The said plea fails to allege the name of person or persons alleged to have agreed for plaintiff that the notes were

never to be paid by the defendant unless alleged adjustments were made.

8. The said plea fails to set forth the time and place of the alleged agreement set forth in said plea.

9. It affirmatively appears from said plea that the note sued upon is a renewal note and the defendant has waived any defense of conditional delivery by the giving of such renewal note.

John M. Allison, Attorney for Plaintiff.

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[fol. 65] In Circuit Court of Hillsborough County.

On the 5th day of April, 1943, in Law Action No. 23569, Motion for Compulsory Amendment of Pleas was filed in words and figures as follows:

Motion for Compulsory Amendment of Pleas

The plaintiff, American Can Company, a New Jersey corporation, by its undersigned attorney, says that the Pleas of the defendant filed herein March 1st, 1943, are so framed as to prejudice, embarrass or delay a fair trial of this action in the following particulars:

As to All Pleas

1. The said pleas, and each of them, are conclusions of law, and no ultimate facts are set forth to support the same.

2. The said pleas, and each of them, fail to present any defense in bar of the plaintiff's action.

3. It affirmatively appears from the pleadings herein that the note sued upon is a renewal note, and by the execution and delivery thereof, the defendant has waived the defenses sought to be interposed.

4. It affirmatively appears that the defendant by said pleas seeks to interpose matters of defense exclusively cognizable in the United States Courts, and the Courts of the State of Florida are without jurisdiction to entertain the same.

As to First Plea

1. The said plea refers to cans of "substantially the same grade and quality", but fails to describe the same accurately, setting forth quantities purchased, points of origin and delivery, and other essential particulars required to advise the plaintiff sufficiently of the matters relied upon by defendant in order for plaintiff to meet or plead to the same.

[fol. 66] 2. It affirmatively appears from said plea that defendant is without knowledge of the matters sought to be charged against plaintiff, and that said plea constitutes an attempt to plead mere suspicion contrary to law.

3. It affirmatively appears that the note sued upon is a renewal note, and the defendant has waived any defense of illegality sought to be interposed by said plea.

4. The said plea fails to set forth any facts to support the conclusion of the pleader that the effect of alleged discriminations was substantially to lessen competition or tend to create a monopoly.

5. The said plea fails to allege whether or not defendant has paid any part of principal or interest on said note.

As to Second Plea

1. It affirmatively appears from said plea that defendant is without knowledge of the matters sought to be charged against plaintiff, and that said plea constitutes an attempt to plead mere suspicion contrary to law.

2. It affirmatively appears that the note sued upon is a renewal note, and the defendant has waived any defense of illegality sought to be interposed by said plea.

3. Said plea fails to set forth any facts to support the conclusion of the pleader that the effect of alleged discriminations was substantially to lessen competition or tend to create a monopoly.

4. The said plea fails to allege that the closing equipment alleged to have been furnished to certain competitors of the defendant was of benefit or value to them or was used by them.

[fol. 67] 5. Said plea fails to allege the amount of rent charged by plaintiff to defendant, or that defendant paid the same.

6. The said plea fails to identify or allege what, if any, "other facilities and services" in addition to closing equipment, were furnished by plaintiff to defendant's competitors.

As to Third Plea

1. It affirmatively appears from said plea that defendant is without knowledge of the matters sought to be charged against plaintiff, and that said plea constitutes an attempt to plead mere suspicion contrary to law.

2. It affirmatively appears that the note sued upon is a renewal note, and the defendant has waived any defense of illegality sought to be interposed by said plea.

3. Said plea fails to set forth any facts to support the conclusion of the pleader that the effect of alleged discriminations was substantially to lessen competition or tend to create a monopoly.

4. Said plea fails to allege whether any of the discounts alleged to have been allowed by plaintiff to defendant's competitors were on like cans to those sold to defendant.

5. The said plea constitutes an attempt to plead upon information and belief without disclosing the sources of information, thereby preventing plaintiff from replying to or meeting such pleading.

6. The said plea fails to set forth the times of the happenings complained of and the particulars of the nature of the several transactions alleged to constitute discriminations against defendant.

[fol. 68] As to Fourth Plea

1. It affirmatively appears from said plea that defendant is without knowledge of the matters sought to be charged against plaintiff, and that said plea constitutes an attempt to plea mere suspicion contrary to law.

2. It affirmatively appears that the note sued upon is a renewal note, and the defendant has waived any defense of illegality sought to be interposed by said plea.

3. Said plea fails to set forth any facts to support the conclusion of the pleader that the effect of alleged discriminations was substantially to lessen competition or tend to create a monopoly.

4. Said plea fails to allege whether any of the discounts alleged to have been allowed by plaintiff to defendant's competitors were on like cans to those sold to defendant.

5. The said plea constitutes an attempt to plead upon information and belief without disclosing the sources of information, thereby preventing plaintiff from replying to or meeting such pleading.

6. The said plea fails to set forth the times of the happenings complained of and the particulars of the nature of the several transactions alleged to constitute discriminations against defendant.

7. It does not affirmatively appear from said plea that the parties referred to are competitors of the defendant within the purview and intent of the United States Code referred to.

As to Fifth Plea

1. The said plea fails to allege the date and amount of the notes given at the time of the transaction alleged.

[fol. 69] 2. The said plea fails to allege whether the defendant has paid any part of principal and interest on said notes since date of said original purchase.

3. The said plea fails to set forth the names and residences of the several purchasers of commodities with whom it is alleged the plaintiff discriminated against the defendant, and the place or places, time or times, where or when, such discriminations are alleged to have occurred, nor the particulars of the nature of the several transactions alleged to constitute discriminations.

4. The said plea fails to set forth whether the goods alleged to have been sold by plaintiff in Texas at prices lower than in Florida, were of like grade and quality in similar quantities and of the same size, and fails to allege essential particulars necessary to advise the plaintiff sufficiently to plead thereto.

5. The said plea fails to allege ultimate facts to support the allegation that the actions complained of lessened competition or created a monopoly.

6. It fails to appear from said plea whether any alleged sales by the plaintiff were to competitors of the defendant within the purview of the laws relied upon.

7. It affirmatively appears that the note sued upon is a renewal note and the defendant has waived any defense of illegality sought to be interposed by said plea.

As to Sixth Plea

1. The said plea fails to set forth the date and amount of the notes given at the time of the transaction alleged.

2. The said plea fails to allege whether the defendant has paid any part of principal and interest on said notes since the date of such original purchase.

[fol. 70] 3. Said plea fails to set forth the names and residences of the several purchasers of commodities with whom it is alleged the plaintiff discriminated against the defendant, and the place or places, time or times, where or when, such alleged discriminations are alleged to have occurred, nor the particulars of the nature of the several transactions alleged to constitute discriminations.

4. The said plea fails to allege the name of the agent or representative of plaintiff with whom the defendant had the alleged understanding of conditional delivery of the notes referred to.

5. The said plea fails to allege whether the alleged prior expressed condition and understanding of delivery of the notes referred to was verbal or written, and if verbal, the terms of same, and if written, to set forth the terms thereof, or attach a true copy thereof.

6. The said plea fails to set forth the facts to support the conclusion of law that the plaintiff received the notes under the alleged understanding and agreement, by setting forth the name of the person taking actual receipt of said notes and making the agreement alleged.

7. The said plea fails to allege the name of person or persons alleged to have agreed for plaintiff that the notes

were never to be paid by the defendant unless alleged adjustments were made.

8. The said plea fails to set forth the time and place of the alleged agreement set forth in said plea.

9. It affirmatively appears from said plea that the note sued upon is a renewal note and the defendant has waived any defense of conditional delivery by the giving of such renewal note.

[fol. 71] Wherefore, plaintiff respectfully moves the Court to strike said pleas from the files or to compel the defendant to amend the same to meet the foregoing objections.

John M. Allison, Attorney for Plaintiff.

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In Circuit Court of Hillsborough County

On August 10, 1943, in Law Action No. 23569, Order Directing Pre-Trial Conference and Consolidating Cause with Case No. 23454-Law, for Purposes of Pre-Trial Conference, was entered and recorded in Circuit Court Minutes Book 87, page 32, in words and figures as follows:

Order Directing Pre Trial Conference and Consolidating Cause With Case No. 23454-Law, For Purposes of Pre-Trial Conference

The above cause coming on to be heard on August 9, 1943, upon plaintiff's demurrer and motion for compulsory amendment addressed to defendant's pleas, and the Court having heard argument of counsel for the parties at length, upon consideration of the premises;

The Court is of the opinion, that in its discretion, a pre-trial conference is necessary herein at this time to simplify the issues to be formulated, to determine the necessity or desirability of amending the pleadings, to obtain admissions of fact and of documents which will avoid unnecessary proof, to limit the number of witnesses, and for such other matters as may aid in disposing of this action; and that by order of both Judges of this Court entered June 21, 1940, pursuant to order of the Supreme Court of Florida entered January 12, 1940, this Court has authority and discretion to hold such pre-trial conference at this time.

[fol. 72] It is therefore Considered, Ordered and Adjudged that before further proceedings in this cause, a pre-trial conference be, and the same is hereby ordered, for the purpose of considering simplification of the issues, desirability of amendments to the pleadings, possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, the limitation of the number of witnesses, and such other matters as may aid in the disposition of the above action; such pre-trial conference to be held without unnecessary delay after reasonable notice to counsel as hereinafter provided.

It Is Further Ordered that at such pre-trial conference, the parties hereto shall present to the Court material and relevant witnesses, records and documents in support of their pleadings filed or to be filed, and that either party hereto is authorized and empowered to take necessary depositions of material and relevant witnesses residing outside this County, and to propound interrogatories to officers, agents, or employees of the adversary party, after due notice thereof to opposing counsel, as provided by Section 90.17, Florida Statutes, 1941, and the rules of practice governing this Court. The purpose of such discovery and investigation shall be to simplify and determine the issues between the parties, and for the purposes hereinabove set forth.

It Is Further Ordered that counsel for the respective parties are directed to take any necessary depositions, and propound any interrogatories as herein provided promptly, in order that such pre-trial conference may not be unreasonably delayed.

[fol. 73] It Is Further Ordered that either party hereto shall have the right to interpose objections to proposed interrogatories before being required to answer the same, and this Court reserves the power to determine the relevancy, materiality and reasonableness of such interrogatories before the same are required to be answered.

It Is Further Ordered that this Court may fix the date of such pre-trial conference upon five days' notice to counsel for the parties, if, following the lapse of a reasonable time from the date of this order, the parties have not diligently proceeded to take such depositions, propound such interrogatories, and obtain such proof to present at such pre-trial conference.

It further appearing and the Court finding that the above cause and Case No. 23454-L, now pending in this Court, and

each of said causes, is upon claims or demands arising out of the same transactions or occurrences between the same parties, and that said causes should be consolidated for the purposes of pre-trial conference:

It Is Therefore Further Ordered that said causes be, and the same are hereby consolidated for the purposes of pre-trial conference, and for the purposes of pre-trial conference, the consolidated causes shall be and are hereby merged into a single suit; and

It Is Further Ordered that the record, including testimony, depositions and exhibits of the respective parties heretofore taken, and also such testimony and depositions, including exhibits, as may hereafter be taken, shall be, and the same are hereby made available for all pre-trial con-
[fol. 74] ference purposes the same as if originally taken and filed in each of the consolidated causes.

It Is Further Ordered that the Clerk of this Court shall record this order herein, and shall enter the same on the progress docket of each of the consolidated causes showing the Minute Book and page where same is recorded.

Done and Ordered at Chambers in Tampa, Florida, this 10th day of August, A. D. 1943.

L. L. Parks, Circuit Judge.

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[fol. 75] In Circuit Court of Hillsborough County

Pursuant to Pre-Trial Order theretofore entered, the following testimony was taken by the plaintiff before the Honorable L. L. Parks on the 15th day of February, 1943, filed June 19, 1943:

Thereupon J. Adams Bruce was duly sworn and questioned as follows:

By Mr. Allison:

Q. Please state your name?

A. J. Adams Bruce.

Q. Mr. Bruce are you the President of Bruce's Juices, Inc.?

A. I am.

Q. Did you hold such office in 1938 to date?

A. I did.

Q. You are familiar with the notes sued on in this case, are you not?

A. I am.

Q. I hand you 3 notes stapled together, each in the principal sum of $12,000, dated respectively October 1, 1941, December 30, 1941 and March 30, 1942, the last two being renewals of the first note, and ask you if those were executed by the corporation?

A. They were.

Q. Were they delivered to the plaintiff on or about the dates that they bear?

A. Yes, sir.

Q. Do you know how these notes were transmitted to the plaintiff?

A. By mail.

Mr. Allison: I ask that the 3 notes stapled together be marked for identification as Exhibit A-1, 2 and 3, the exhibits to be composed of the three notes.

[fol. 76] By Mr. Allison:

Q. Mr. Bruce I hand you 5 promissory notes, each in the principal sum of $19,799.97, bearing dates respectively, February, 27, 1941, May 28, 1941, August 26, 1941, November 24, 1941, February 23, 1942, and ask you if those notes were executed by Bruce's Juices, Inc.?

A. They were.

Q. And transmitted likewise by mail to the plaintiff?

A. Yes, sir.

Mr. Allison: I ask that those exhibits be marked for identification as Plaintiff's Exhibit, B-1, B-2, B-3, B-4 and B-5.

Mr. Allison: Mr. Bruce I hand you two notes dated August 31, 1940, in the principal sum of $27,184.00, dated August 31, 1940, and another note in like sum dated November 29, 1940, and ask you if those notes were executed by your company?

A. Yes, sir.

Mr. Allison: I will ask you that these be marked for identification as Exhibits C-1 and C-2.

By Mr. Allison:

Q. The reason I ask you to identify these notes Mr. Bruce is for the following purpose. Is it not a fact that the 5 notes marked Exhibit B were renewal of the 2 notes you have just described?

A. Yes, sir, there is an indorsement on the back of these.

[fol. 77] Mr. Allison: I ask that these be marked for identification as Exhibit C-1 and C-2.

By Mr. Allison:

Q. Mr. Bruce I hand you herewith 7 promissory notes, each in the principal sum of $7,039.25, dated respectively August 31, 1940, November 29, 1940, February 28, 1941, May 28, 1941, August 26, 1941, November 24, 1941 and February 23, 1942, payable to the American Can Company, Southern, and ask you if those notes were executed by your company and also transmitted by mail to the payee?

A. Yes, sir.

Q. You will note that these notes are stapled to several other notes in larger amounts, and I will ask you if the notes you have just identified are the renewals of those other notes enclosed within the same staple?

A. There are two sets of notes here. One starts on May 26, 1939 at $7,978.10, and was reduced and renewed until January 22, 1940, when it was then in the amount of $5,538.76. There is also a note dated September 19, 1939 in the amount of $1,518.29, which was renewed on November 18, 1939. These two sets of notes were combined on March 1, 1940 into that amount.

Q. Then the 7 notes in the sum of $7,039.25 were renewal of the indebtedness represented by the other notes stapled together?

A. They are renewals of those notes that are stapled to it.

Mr. Allison: I ask that the 7 notes identified be marked Exhibits D 1 to 7, inclusive, for identification.

[fol. 78] Q. Now, Mr. Bruce showing you Exhibits A-1, B-1 and D-1, I ask you if your records don't show the principal amount of those notes now due by Bruce's Juices, Inc. to the plaintiff?

Mr. Fowler: I take it you don't mean that for an admission?

Mr. Allison: No, sir.

By Mr. Allison:

Q. Your record shows that amount is due and payable to the plaintiff?

A. My records show that.

Q. I call your attention to the several Exhibits which show notations of payment of interest, and in some cases reduction of principal, and ask you if these payments were made by Bruce's Juices, Inc.?

A. They were.

Q. Mr. Bruce did you have a written contract with the plaintiff covering the purchases of cans during the period of time that the indebtedness represented by these notes came into being?

A. Yes, sir.

Q. Do you have that contract with you?

A. No, I only have a contract dated November 6, 1939, covering the 3 years of January 1, 1940 to December 31, 1942.

Q. There was a similar contract in printed form covering the period prior to this contract executed by your company and the plaintiff, is that correct?

A. Yes, sir, there was a contract, whether it was the same or not I don't know.

[fol. 79] Q. Now you also had a contract with them covering your purchases in the state of Texas, did you not?

A. That is correct, with the American Can Company, Southern.

Q. I believe you had in all two contracts with the plaintiff covering the purchases for your Florida Canning plant, the last one and one prior thereto?

A. Oh, no, we have had several contracts.

Q. You mean several distinct contracts or supplements?

A. Several contracts running back for a period of years, but those contracts are from one to three years in length, and they go back to about 1930.

Q. Now that contract contains a scale of quantity discounts, does it not?

A. Yes, sir.

Q. Do you know of your own knowledge whether that same form of printed contract was entered into by the American Can Company with all other Florida canners?

A. I was given to believe that it was.

Q. You know nothing to the contrary?

A. No, sir.

Q. And the form of your Texas contract was the same with the American Can Company, Southern entered into with other Texas canners?

A. As far as I know.

Q. Mr. Bruce, during the period of time that this indebtedness came into being and existed, did you participate in the quantity discount scales shown in the contract?

[fol. 80] A. On one year.

Q. Was that because the volume of your purchases was sufficiently large only in the one year for you to enjoy that discount?

A. That is correct.

Q. Mr. Bruce do you keep a business diary?

A. I don't know exactly what you mean by a business diary.

Q. A diary or desk book in which at the time that you make trips or have conversations which are not evidenced by a written memorandum, wherein you make your own notations of your own activities on that particular occasion?

A. Yes, sir, I do.

Q. Did you make the entries therein yourself?

A. Yes, sir.

Q. Did you keep that diary during the period of time covered by your pleas in which you stated you discussed this matter with the plaintiff from time to time?

A. Yes, sir.

Q. Do you have that diary with you?

A. No.

Q. Is it available?

A. I haven't looked at it recently. I assume it is.

Q. It goes way back into that period?

A. I am not sure.

Q. Do you recall whether you posted your notations in there at the time they occurred, or did you go back later and make entries?

[fol. 81] A. It is usual for me to post them at the time they occurred.

Q. Do you recall whether you made any entries in that diary of your discussions with the American Can Company officials?

A. I know I did on some occasions.

Mr. Allison: Mr. Fowler I will ask you at the next hearing if Mr. Bruce can locate that if you will bring it.

By Mr. Allison:

Q. Now Mr. Bruce, I believe you stated that the records of the Bruce Juices Inc. show the indebtedness represented by these notes as due and owing to the American Can Company?

A. Our books are kept in accord with the American Can Company's books.

Q. Do your books show any claim or offset outstanding as due from American Can Company because of the adjustments you refer to in your pleas?

A. No.

The Court: You may explain that if you want to at this time.

By Mr. Allison:

Q. Mr. Bruce I hand you herewith a statement in writing, dated October 31, 1941, addressed to the American Can Company, Tampa, Florida, signed by Wilkins & Harvey, Certified Public Accountants, and by Bruce's Juices, Inc., by yourself, and ask you if that is your signature?

[fol. 82] A. Yes, sir, that is my signature.

Q. So far as you know are the matters as set forth in that statement true and correct?

A. Yes, sir, they agree with our books.

Mr. Allison: I ask that that be marked as Exhibit E-1 and E-2 for identification.

By Mr. Allison:

Q. Mr. Bruce were all of the purchases made by Bruce's Juices, Inc. from the American Can Company or the American Can Company, Southern, as the case may be, made pursuant to the written contracts with them?

A. Yes, sir, or the amendments to them.

Q. The amendments or predecessors, as the case may be?

A. Yes, sir.

Q. Now in your amended first plea you have alleged as a fact that the American Can Company directly and indirectly discriminated in price between different purchasers of cans of like grade and quality. Please let us know where and to whom the plaintiff sold and discriminated as you allege?

Mr. Fowler: We object to that question as being entirely unfair, as it goes into something entirely different, and it is not the purpose of this hearing.

The Court: I think the question is proper, Mr. Fowler. [fol. 83] In this connection in the event that Mr. Bruce does not know of some instance where he claims discounts, but has his suspicions that he is entitled to them, then the plaintiff's witnesses can be inquired of at the proper time.

A. To avoid confusion I would like to explain that we bought in a general way two different types of cans from the American Can Company, and for convenience I will refer to the first type as little cans and the second type as large cans. In the discriminations in price on the little cans we were buying a size 2 x 314 and paying a certain price for them.

By Mr. Allison:

Q. What price?

A. $10.14 per thousand f. o. b. Baltimore, car load water rate of freight allowed to Tampa.

Q. Which made the cans cost you $10.14 at Tampa?

A. Plus certain lithograph and lacquer charges that were added to it. Those cans cost us $10.14 f. o. b. Baltimore or $10.14 f. o. b. Tampa, at the same time the American Can Company was selling the competitors at various points throughout the country, such as Baltimore, Md., Austin, Indiana, Houston, Texas, and other points, a can 202 x 312 which is substantially the same can, for $9.68 per thousand f. o. b. those points. The American Company was selling us a can, 202 x 300 at $8.95 per thousand, f. o. b. Baltimore, car load water rate of freight allowed to Tampa, which made the price of that can $8.95 at Baltimore or f. o. b. Tampa. Of course we bought these cans and there were additional litho- [fol. 84] graphing and lacquering charges. Now the comparison of these three cans in their price f. o. b. Baltimore will show discrimination in favor of the 202 x 312, which was

used by competitors and the 202 x 300 and the 202 x 314 which was used by us.

The Court: Is that all Mr. Bruce?

A. The thing is very complicated. I can talk on it for hours, but I am trying to simplify it so that you will get the whole picture, and I will have completely answered his question.

Mr. Fowler: There is no objection to your going into detail if you desire to.

A. I think I have answered his question.

By Mr. Allison:

Q. When did this occur, Mr. Bruce?

A. Between 1939 and the present time.

Q. And who were the competitors to whom these lower prices were made available?

A. Among others there were the Engleman-Gardens Co. of Edenboro, Texas, Border Packing Company of Brownsville, Texas, Morgan Packing Company of Austin, Indiana.

Q. Engleman-Gardens Co. in Edenboro, Texas were required to pay the freight from the point of manufacture to their plant, were they not, or do you know?

A. Yes, sir.

Q. Do you know what that freight amounted to?

A. About 50 cents a hundred weight.

Q. So that the 202 x 312 can was costing them about $10.18 at their plant.

A. Yes, sir.

[fol. 85] Q. Isn't the same thing true of the Border Packing Co. in Brownsville, Texas?

A. Yes, sir.

Q. And the same thing with us if we bought and had it delivered to any point other than Baltimore or Tampa?

A. Yes, sir.

Q. The American Can Company, Southern had a plant in Houston, Texas, did they not?

A. Yes, sir.

Q. Was the $9.68 price effective at that plant?

A. Yes, sir.

Q. If you had chosen to order cans from that point delivered to you in Tampa were they available to you?

A. From Houston, Texas?

Q. Yes, sir?

A. I don't think so, because the American Can Company, Southern operates the plant at Houston, Texas, and I am sure they would not be permitted to deliver cans into the territory of the American Can Company.

Q. During a part of this time didn't you operate a plant in Texas yourself?

A. Yes, sir.

Q. Under the name of Bruce's Juices?

A. Yes, sir.

Q. Where was that in Texas?

A. Santa Rosa.

[fol. 86] Q. How far is that from Houston?

A. About the same distance as Edenboro.

Q. Was the price of $9.68 available to you for your Texas plant, f. o. b. Houston?

A. Yes, sir.

Q. That was the same price that Edenboro had?

A. Yes, sir.

Q. Then you were buying at the same price f. o. b. Houston on the same basis as your competitors in Texas?

A. Yes, sir, on the same can, but I assume that if we took the 202 x 314 out of Texas we would pay the price of $10.14, which would make them discriminating against us.

Q. Mr. Bruce you know in a general way something about the manufacture of cans?

A. Yes, sir.

Q. And that when a new size is to be made different from those that are then being manufactured it is necessary to make changes in the can making machinery, isn't that correct?

A. Yes, sir.

Q. At the time you first started buying the 314 can at Baltimore do you know whether the plaintiff's plant in Tampa was equipped to manufacture that can?

A. It was not.

Q. Do you know whether the plaintiff's plant in Houston was then manufacturing the 314 can?

A. No, sir, it was not.

Q. As a matter of fact the operation of your business lead to the greater use of the 314 can, did it not?

A. Yes, sir.

[fol. 87] Q. Isn't it a fact that the plaintiff put in the necessary machinery in Tampa to manufacture the 314 can here?

A. That is correct.

Q. Was that done at your request?

A. No, sir.

Q. Now during the period from 1939 through 1941, did your business on the small can increase?

A. From 1937 to the present time it has increased. There was a temporary drop of two years in the season of 1939-1940 and 1940-1941.

Q. In that way, as alleged in your plea, did this discrimination lessen competition?

A. The American Can Company sold to competitors a can of the same grade and quality at a lower price.

Q. But it was not the same size can?

A. It was to all intents and purposes the same size can because it sold in the retail trade at the same price. The consumer paid the same price for the merchandise in the two cans, therefore, it was for all intents and purposes the same size can, but one was 312 and one 314.

Q. The same machinery could not make the same cans?

A. They could with a very slight adjustment.

Q. You don't know the extent of the adjustment?

A. A very slight one.

Q. And that fact lessened competition, the fact that they sold the 312 can the same as the 314?

[fol. 88] A. Yes, sir.

Q. And at the same time your business increased?

A. Our business increased, and it increased up to the time that this competition came in, and it decreased as long as that competition lasted, but when the competition was wiped out it increased again.

Q. Were these sales to the competitors you have described in greater or less quantity than your purchases?

A. Both greater and less quantities.

Q. You mean to the same purchaser at the same time?

A. Yes, sir.

Q. You mean that Engleman-Gardens Co. bought less or more than you did?

A. I suppose you are asking for the purchases by years?

Q. Yes, sir, between the time you described between 1939 and the present time.

A. My answer is that in one year they bought more and in other years they bought less than we bought in those same years, and they got the price of $9.68 against our price of $10.14.

Q. Do you know whether at all times the price of $9.68 f. o. b. Houston was available to you and to them?

A. No, it was not.

Q. You mean they quoted a price to your competitors of $9.68 f. o. b. Houston and refused to give you the same price f. o. b. Houston?

A. They quoted a secret price of $9.68 to Engelman-Gardens Co. and never let us know anything about the price. We first found out about this price when the customers [fol. 89] of the Continental Can Company down in the valley, which was the area they were selling to, became aware of it, and the customers of the Continental Can Company appealed to the Continental Can Company and had them rebate the price that they had been charging against the price that the American Can Company had been giving to Engelman-Gardens Co., and that was the first we knew that the same price had been named to Engleman-Gardens Co.

Q. When was that?

A. We became aware of it in the Spring of 1940.

Q. At that time were you operating your plant in Texas?

A. Not at all.

Q. Did you operate before or after the Spring of 1940 in Texas?

A. We operated before but not after.

Q. Did you ever obtain a price quotation on the small can when you were operating in Texas?

A. No, sir, we never used the small can in Texas, but we assumed, as is usual in the price established for cans, that the price f. o. b. Houston, Texas is the same as in any American Can Company plant in the Eastern area. The American Can Company have plants at Baltimore, Maryland, Tampa, Florida, and at Fairport, New York, and the American Can Company, Southern, which is just a subsidiary, and acts as the American Can Company in Houston, Texas and New Orleans, La., and the price usually on any can for which there is a steady and regular demand is the same f. o. b. factories of the American Can Company, including those I have named, so if we were buying our cans f. o. b. Baltimore at a stated price we should buy those

cans f. o. b. Houston at the same price. Now we were buying [fol. 90] 202 x 312 during the year of 1939, and up until January 11, 1939, and we paid a very much higher price than that which would be represented by $9.68 f. o. b. Baltimore or Houston on the same can.

Q. You bought that under a written contract?

A. We bought that under a price list.

Q. What was the price f. o. b. Baltimore of the 312 can in 1938?

A. On May 13th through December, 1938 our price was $13.10 f. o. b. Baltimore, car load water rate of freight, equalized with Tampa.

Q. On the 312 can?

A. Yes, sir. We also made a purchase on the 6th of September, 1938 at that price f. o. b. Baltimore, freight equalized with Fairport, New York. Those cans were going to the Geneseo Jam Company, Geneseo, New York. They were going to that company and the American Can Company shipped them from Baltimore but charged us the freight from Fairport, New York, at which point they had an American Can factory, to Geneseo. We were not given the price of f. o. b. Baltimore less the car load water rate of freight to Tampa, plus the freight from Baltimore to Geneseo, but the American Can Company absorbed the freight to their nearest canning factory and then we paid the freight from their nearest can factory to the final destination of the can, which is exactly the position of the Engelman-Gardens Co. in Texas.

Q. You were going to pack those cans in Geneseo, were you not?

A. Yes, sir.

[fol. 91] Q. Do you know whether anybody else was allowed freight to Geneseo by the plaintiff among your competitors?

A. Not that I know of.

Q. Now you referred to a secret price allowed to the Texas packers. Do you know whether they had written contracts with the American Can Company, Southern?

A. I don't know.

Q. You have no knowledge whether that price may have been in the contract if they had one?

A. No, sir.

Q. What is your knowledge then that this was a secret price?

A. Because it was not made available to us. It was not known by plaintiff's competitors as it was usual for the American Can Company and the Continental Can Company to be aware of what general prices were in effect.

Q. Were you at that time operating a canning plant in Texas?

A. No, sir.

Q. Your complaint then is that you could not buy the same cans at Tampa for the same price the Texas packers bought that size can for in the Texas Rio Grande Valley?

A. The discrimination is that they were charging us a certain price for cans of a certain size and charging competitors a price substantially less for a can which was practically of the same dimensions.

Q. And yet you were paying $10.14 f. o. b. Tampa and they were paying $10.18 f. o. b. Edenboro and Brownsville, Texas?

[fol. 92] A. We were paying $10.14 f. o. b. Tampa. That would be $10.14 f. o. b. Tampa or any other can making factory of the American Can Company in the eastern area, and they were paying $9.68 f. o. b. Houston, or any other can making plant in the eastern area.

Q. But the cans did not do them any good until they got them to their own canning plant, and they had to pay the freight, is that correct?

A. Yes, sir, and if we had been buying the 314 in Texas we naturally would have paid the price of $10.14 f. o. b. Houston, plus the freight.

Q. You were not then buying the 314 cans for your Texas cannery?

A. No, sir.

Q. Now Mr. Bruce the notes in the suit which you have identified, and I refer to the $12,000 note dated March 30th, 1942, the $19,799.97 note dated February 23rd, 1942 and the $7,039.25 note dated February 23, 1942, were not actually executed and delivered at the time that the cans were purchased, which created the indebtedness. That is correct, is it not?

A. They were renewals of former notes given when the cans were purchased.

The Court: I think he has already testified to that.

By Mr. Allison:

Q. In your second plea you refer to closing equipment. To whom, where and when did the plaintiff furnish closing equipment without charge, as you allege to be a fact?

[fol. 93] A. I think it was done in a number of places, particularly the Taormino Corporation, Donna, Texas, was one, and the California Packing Corporation, in various or different plants throughout the country.

Q. How do you know that?

A. We have made investigations. I had various members of our organization make investigations.

Q. When was this done?

A. At various times, and particularly at times between 1937 and the present time.

Q. You allege that you were charged rent?

A. That is correct.

Q. Was it the same kind of equipment furnished to the Taormino Corporation and the California Packing Corporation?

A. Yes, sir, it performed the same service.

Q. What rent were you charged?

A. The rents were according to the closing machine contract.

Q. You had a written lease on the equipment, did you not, and you paid if you used it?

A. Yes, sir.

Q. And you were charged an amount pursuant to your agreement?

A. That is right.

Q. And you paid for it?

A. Yes, sir.

Q. Did you use the equipment from time to time?

A. Yes, sir.

[fol. 94] Q. Do you know whether the Taormino Corporation and the California Packing Corporation used the equipment furnished to them?

A. They did.

Q. And you say between 1937 and now at times the American Can Company furnished closing equipment to the Taormino Corporation and the California Packing Corporation, and at various points without charge?

A. In all probability a lease was executed as with us, and payment may have been made on that, and perhaps at the

end of the season a claim for damages, or something would go in, covering the amount of the lease, which would be paid.

Q. Mr. Bruce you have made a point blank charge that closing equipment was furnished competitors by the plaintiff without cost. In order for the plaintiff to know what issue it will meet I am asking you these questions. Your last answer tended to indicate that your charge may be based on a "perhaps", something that may have happened. Now do you mean that you don't know this of your own knowledge, this charge?

A. We have made investigation and we found that these things have happened.

Q. Then your plea is a direct charge that the closing equipment was furnished to these two companies at the time you indicated without charge?

Mr. Fowler: The plea speaks for itself.

A. They got their closing equipment rent free and in some cases they may never have paid the rental that was charged. In other cases they may have paid the rental and may have been rebated back at the end of the season in an amount equal to the lease rental.

[fol. 95] Q. When and where did that happen?

A. I have already stated that.

Q. Do you mean that the Taormino Corporation did or did not pay rent for the closing equipment.

A. I have already stated that.

Mr. Fowler: He swore positively that they got their rent free, and he said that different methods were used.

The Court: Mr. Allison wants to know what method was used.

Mr. Fowler: How can we tell what methods were used.

By Mr. Allison:

Q. This is your affirmative charge, and I ask you what methods were used?

The Court: I think Mr. Bruce you can answer that question, the methods that were used at each of those plants, if you know?

A. No, I don't know which method was used in any particular plant, or any particular day that the transaction was executed.

By Mr. Allison:

Q. Who made the investigation for you as to this charge of closing equipment?

A. It was made by various members of our organization who went out and consulted other people.

Q. Who were those people?

A. Among our organization. I can give you practically a list of our salaried employees.

[fol. 96] Q. Who was the first one?

A. I am.

Q. Who else?

A. G. P. Peer, W. J. DeLaney, H. E. Bruce, J. A. Blake, A. W. Proper, D. C. Thomas.

Mr. Fowler: If the Court please, we don't have to go into the extent of the evidence that we can obtain, or how we got the information on which we base our suit, but this is to see what the wishes are, and to see how the matter can be made as simple as it can be for the Jury, and I submit that how we obtained the evidence he is inquiring about has no place in this hearing.

The Court: You all cannot use as evidence conversations between Mr. Bruce and one of his competitors who told him about this secret rebate. He could not use that in evidence against the American Can Company unless the American Can Company was present when this conversation occurred, therefore, I think in order for the American Can Company to know with what companies these things happened they should know who talked to who at those various places. Now if Mr. Bruce does not know all of that, and I don't think he does, he can state all of these things so that you [fol. 97] fellows when you go to New York to take the depositions of the Can Company officials the Can Company officials can have those records available there so that you can examine them at that time and you can determine what the situation is.

By Mr. Allison:

Q. Now did your investigation, Mr. Bruce, cover the furnishing of the equipment to the two companies you named?

A. Yes, sir.

Q. Did you personally investigate the transaction through these two companies?

A. Yes, sir.

Q. Did you contact officials of those two companies?

A. No sir.

Q. Did you talk to any officials of the American Can Company about the matter?

A. No.

Q. Now with reference to your third plea, Mr. Bruce, in which you allege discounts and allowances, and particularly discounts and allowances to the California Packing Corporation and Stokely Bros. & Co. at Tampa since June, 1936, and your plea also deals with other companies in the second paragraph of the plea. Did those companies have written contracts with the plaintiff, do you know?

A. I suppose they did.

Q. Do you know whether those contracts were in the same printed form as the contract with your company?

A. I don't know positively but I suppose they were.

[fol. 98] Q. Do you know whether the same scale of discounts obtained in both contracts?

A. I don't know but I suppose so.

Q. Do you know what volume Stokely Bros. & Co. and the California Packing Corporation purchased during the times complained of in their Tampa factories?

A. I doubt if in any year they purchased, either one of them purchased, as many cans in their local factories as we did. I know positively in certain years they did not purchase as many cans from their local factory as we did. Because the cans manufactured in the local plant went to the local plants of Stokely Bros. & Co., California Packing Corporation and ourselves—I am talking about large cans now—as they were ordered by any one of the three canners. That means that when a can was actually manufactured, and in many instances even loaded into the car, it was not known whether that can would eventually reach Bruce's Juices cannery or the canneries of the other two competitors. We were buying from this local factory of the American Can Company more cans than either of the two, and yet they were buying their cans at 5% less than we were paying.

Q. Do you know during that time of the volume of business those two companies did with the American Can Company?

A. What they were buying from the local factory?

Q. I am asking you if you knew what volume they were doing in their entire operation, doing with the American Can Company?

A. No.

[fol. 99] Q. Do you know whether or not during the time that you refer to the discount you allege was given to those two competitors was likewise available to you if your volume came within the required amounts?

A. Oh, yes.

Q. It was available?

A. Oh, yes.

Q. The same thing is true in the third paragraph of the plea which refers to the discount allowed to the California Packing Corporation, Stokely Bros. & Co., Houston Packing Co., Libby, McNeil & Libby and the A. & P. Tea Company?

A. Yes, sir.

Q. Did you ever investigate through officials of the American Can Company to see if those competitors had the same contract available to you?

A. As they had?

Q. Yes?

A. No. I was always given to understand it was the same contract.

Q. They had a big volume in their entire operations, larger than your volume in your canning operations?

A. Yes, sir.

Q. Your position is that you bought more cans from the plaintiff from their Tampa factory than the Tampa branches of Stokely Bros. & Co. and the California Packing Corporation did from that factory for their Tampa canneries?

A. Yes, sir.

[fol. 100] Q. Were those cans all the same size?

A. The cans that were delivered to the three canneries referred to in Tampa were absolutely identical, because when the can was manufactured it was not known to which of the three canneries that can might eventually go.

Q. I presume you checked with the records of your competitors and the Can Company to determine that your volume was greater than theirs?

Mr. Fowler: We object to that question.

The Court: I think the question is proper.

A. I don't know that I did.

Q. In order to clarify your last point. Although you were doing a larger volume in Tampa than the Tampa Branches of your competitors, you were not doing a larger volume for your entire operation than those two competitors were doing, in their entire operations?

A. That is correct.

Q. Then your charge in this plea that although the discounts allowed to them may have been based upon their entire operation because you were doing more business in Tampa than your competitors Tampa Branches were doing?

A. A discount was given to the California Packing Corporation and to Stokely Bros. & Co. on the purchases they made for use in their Tampa plants, and that we were entitled to have them pay the same price that we paid.

Q. It was the discount that affected the price. That is your position in the plea?

A. Yes, sir.

[fol. 101] Q. And your position is that even though the Tampa Branches of your competitors purchases may have been embraced in a contract with the American Can Company covering cans to be sold to all of those competitors factories at least you should have been treated equally with them because you did more business in the Tampa area?

A. Our complaint is that we were buying identically the same cans as the California Packing Corporation and Stokely Bros. & Co. from the same plant delivered in the same community, and we were buying in larger quantity than those canners, and the purchases made by those canners were allowed a 5% discount which we were not given. Substantially 5%.

Q. Isn't it a fact that during that time those two competitors bought ten times more cans from the American Can Company than you bought?

A. From the local factory?

Q. No.

A. They bought a lot, I admit that.

Q. And you are not charging that they were allowed any discount other than that which was available to you if you had reached the same volume?

A. No, it was in our contract.

Q. The fourth paragraph of your third plea refers to delivery charges which you state you were required to pay in the sum of $11,000, and your Tampa competitors, California Packing Corporation and Stokely Bros. & Co. were not required to pay it. What was available to you in the shape of delivery charges if you had taken rail delivery of all your purchases?

[fol. 102] A. We would have had it delivered at our plant.

Q. Do you know whether your two competitors had deliveries other than by rail at their plants?

A. I don't know.

Q. Do you know during the time described whether the American Can Company at Tampa maintained trucks to make deliveries to customers?

A. I don't know.

Q. Isn't it a fact that the deliveries you refer to which cost you money were made by your trucks, or trucks obtained by you, because of your desire to obtain deliveries in that fashion?

A. Not necessarily.

Q. Mr. Bruce you could have gotten them by rail at your warehouse door with no delivery charge. Is that correct? And the delivery charges would be absorbed by the American Can Company? But you choose to take them by truck at the American Can Company track, did you not?

A. Yes, sir, at a considerable saving to the American Can Company because if they were delivered by rail the American Can Company would have to pay a switch charge, and they did not give us any allowance at all on that.

Q. The point is they did not pay anybody else any allowance at all. Any allowance for switch charges, did they?

A. Yes, sir, they did.

Q. To whom?

A. To Stokely Bros. & Co. and the California Packing Corporation.

[fol. 103] Q. You mean they made them deliveries other than by rail?

A. No, they made them deliveries by rail which cost them the switch charge.

Q. But you could have gotten yours the same way if you wanted to?

A. Yes, sir, but we took them by truck and made that saving to the American Can Company.

Q. That was your choice, was it not?

A. Yes, sir.

Q. There is an element of labor in getting to the platform at the Can factory, the same as there would be an element of labor in putting them in a railroad car?

A. I suppose so.

Q. Because a motor truck cannot hold as many cans as a railroad car that labor would be repeated until the same volume was reached. In other words, you would have

several loads by truck to equal the capacity of one railroad car. So there was a cost to the Can Company in giving you delivery by truck. Explain that? They had to put the cans out there to go in your truck?

A. Yes, sir.

Q. At the time you took these deliveries by truck did you have warehouse space to take the delivery by full railroad cars and store the cans?

A. Yes, sir, we had.

Q. But you still preferred to go and get them in your own trucks?

[fol. 104] A. Mr. Slayton, who is the manager of the Can Company, came over and consulted with our people and gave his opinion that it would be more satisfactory to us to receive them by truck than by car, though eventually we did receive them by car. It was a matter of agreement between the Can Company and ourselves; the Can Company agreeing that it would be as well for us to take them by truck and show a saving to the Can Company of several thousands of dollars over a period of years.

Q. But there was no lower prices to your competitors on account of delivery charges?

A. They paid the switch charges.

Q. But they would have paid that for you?

A. It was an agreement between the Can Company and ourselves that it would be best for us to take them that way, though ultimately we took them by car.

Q. Your contract provided you could receive them by rail delivered at your plant?

A. Yes, sir.

Q. At any rate the custom was that you could get full rail cars delivered at your plant without any delivery or switch charges if you choose to take them that way?

A. We eventually did, but the matter was discussed and agreed between the Can Company and ourselves that it was better to take them by truck than to take them by rail car.

Q. Did you ever request delivery by rail in car load lots from the plant here when they failed to so deliver them?

[fol. 105] A. Yes, sir, we asked for them and Mr. Slayton came over, looked the situation over and on his advice we agreed that it would be better to take them by truck.

Q. When was that conversation with Mr. Slayton?

A. I think that was back in 1935. I am not sure.

Q. Was any request ever made by you to the American Can Company for a full car load delivery of cans by rail to your plant which they refused to deliver?

A. That I don't know.

Q. In reference to your fourth plea, that mentions cans sold in Texas at prices lower than prices charged by the Can Company elsewhere in the United States. Are you referring there to the same manufacturers referred to in the first plea, Engelman-Gardens Company, Border Packing Company and others?

A. Yes, sir, that is right.

Q. Do I understand the complaint in your fourth plea regarding the prices in Texas deals with the $9.68 price on the 312 can f. o.b. Houston as compared with the $10.14 price on the 314 can in Tampa?

A. In part, yes, sir, but there is much more to it than that.

Q. What does the other deal with, what type of cans and what competitors?

A. The $10.14 can f. o. b. Baltimore. In that plea it is customary and the practice of the American Can Company to sell cans of the same sizes generally throughout the East f. o. b. their various can factories at the same prices. They [fol. 106] sold the 202 x 312 f. o. b. Houston, Texas, at a price of $9.68, but they would not sell the 202 x 312 at Tampa at $9.68, although on many other accounts their price at the two factories was identical.

Q. Isn't it a fact that more customers used the other sized cans than used the 312 can here and in Texas. What I am getting at is certain sizes of larger cans was more generally used by canners?

A. We were prepared to buy whatever size we wanted in this small can in volume that was necessary in order for them to get the lowest cost possible. They quoted us always 500,000 cans being the minimum quantity they required in order to get the minimum price, and we were buying in quantities of two million, four million and five million, very much larger quantities than the minimum quantity which they said was necessary in order to get the lowest price.

Q. You mean those purchasers called for the same size can?

A. Yes.

Q. Those millions are cans and not dollars?

A. Yes.

Q. The point I tried to make before, Mr. Bruce, this small can, the individual service can, be it 312 or 314, was not as generally used by canners as the larger can which might be used for vegetables and fruits, or things of that sort, I think they call it the Number 2 can in the grocery stores. That can was more generally used by the canners than the little individual service can?

A. Oh, yes, but not to the point that the cost of the little can should not be at this minimum.

Q. Was that Number 2 can that I just referred to the same type of can where you say their price on many other cans were identical in Texas and Florida?

[fol. 107] A. Yes, sir.

Q. Did any other canners besides Bruce's Juices use the 314 can?

A. Yes, sir.

Q. Who?

A. A number of canners in Florida.

Q. You started out with the 312 can and then changed to the 314?

A. That is correct. We started with the 309 and went to the 312 and then to the 314, and also used the 300.

Q. The difference in the contents is the fraction of an ounce in those sizes, I believe. The 309 is 5½ ounces. 312 is 5¾ and 314 is 6 ounces and the 300 is 4½ ounces. You standardized on the 314 and the 300?

A. Yes, sir.

Q. I understood you to say that the Tampa factory equipped itself to manufacture the 314 can?

A. It never lithographed the plate here. After repeated and constant requests from us to get the price lower, we persuaded them to lithograph the plate in the north and send the plate down, the sheets of tinplate, and have them cut and formed here.

Q. After that you did not buy that size can any more f. o. b. Baltimore?

A. I rather think we did. I don't know the exact date they equipped themselves to form the small can down here.

Q. You recall they did equip the Tampa plant to turn out that 314 can?

A. Yes, sir.

[fol. 108] Q. And after that your deliveries were all from the Tampa plant when that size came?

A. I will not be sure.

Q. Did any canners other than in Florida use the 314 can?

A. I don't know.

Q. Who were the Florida canners you say used it?

A. Pasco Packing Corporation, Florida Gold, Florida Fruit Canners and the Hills Brothers, the others I don't recall.

Q. Now you state that the prices in Texas being lower than those charged in Florida was done for the purpose of destroying competition?

A. Yes, sir.

Q. Did you ever ask the plaintiff if that was the purpose?

A. I discussed it with them at great length.

Q. What officials?

A. Mr. Nugent, Mr. Jenkins, Mr. Sarver, Mr. Geier, Mr. Slayton and Mr. Taylor.

Q. During those discussions you asked them if this difference was for the purpose of destroying competition, or words to that effect?

A. Yes, sir.

Q. Those conversations were held where?

A. At various points in the office of the American Can Company, at various restaurants in New York and in our office here in Tampa, and in various places in Tampa, New York or Chicago, wherever we might be at a meeting.

Q. Was that over a period of years?

[fol. 109] A. From the spring of 1940, when we became aware of the discriminations, until the suit was filed.

Q. The questions I have asked you relate to your fourth plea, and your answer, I believe, related to that?

A. Yes, sir. The fourth plea I believe I can explain that without going through a lot of questions. The fourth plea is that the American Can Company were charging a certain price for its cans which should have been the price they charged for those cans in Houston, Texas, but they actually charged a lower price for those cans in Houston, Texas, and that forced the Continental Can Company when it became aware of the secret price which the American Can Company was letting its customers have purchases out of the Houston, Texas plant, to lower its price also to meet the secret price

which had been named by the American Can Company, and so the American Can Company forced us into a position not only of being discriminated against by its own customers, but also by the customers of its competitor.

Q. And during that time you don't know whether the same price charged by the American Can Company f. o. b. Houston to these customers was not likewise available to you?

A. —— ——.

Q. How do you know. Did you ask some official of the Can Company for that price?

A. Yes, sir, we were continually asking for lower prices as we were complaining that the price they were charging us for cans was too high.

Q. Did you ask them for a $9.68 price f. o. b. Houston and was refused?

[fol. 110] A. I never knew that the $9.68 price existed in Houston. I asked them for a lower price in any manner or form, and then the Continental Can Company became aware of the secret price that had been named to Engelman-Gardens Company and they were forced to knock their price down to their customers, and they knocked their price down which damaged us.

Q. At that time you were not operating a canning plant in Texas and paying a price greater than $9.68 for the same can which was sold by the plaintiff to the Engleman-Gardens Company?

A. No, but we were operating a canning plant in Florida and we were paying a higher price than they were paying at Houston, Texas.

Q. But you were not paying a higher price than the other Florida canners were paying for the same can in Florida?

A. I don't know any other Florida canners who were buying it at that time.

Q. Now in reference to the fifth plea which refers to the giving of the notes in the suit. Your plea alleges that at the time the notes in the suit were signed a controversy existed between the plaintiff and the defendant regarding certain adjustments and credits claimed by the defendant to be due on account of discriminations. Was there such a controversy at the time the notes in suit were signed and delivered. That is these three notes here?

A. Yes, sir.

Q. Was there any comment made by you or your company at the time the notes were signed and delivered relating to the controversy?

A. These notes.

Q. Yes, sir.

[fol. 111] A. Reference was made by the Treasurer of the American Can Company to that controversy at the time these notes were signed.

The Court: You can go ahead and say what was said.

A. The American Can Company, Southern wrote us on February 12, 1942 in connection with the note D-1. "Your note dated November 24, 1941 for $7,039.25 is due at this office on February 23rd in accordance with arrangements that have been made between yourself and our Credit Department this note may be renewed for 90 days. A renewal note form is attached hereto for your signature. The interest on the old note from November 24th to February 23rd amounts to $88.96. Will you kindly return the signed renewal note with your check for the renewal to reach us by the due date of the note. Yours very truly, American Can Company, Southern, R. A. Burger, Treasurer, and on February 12th, 1942, which deals with B-1, American Can Company wrote us as follows:

"Your note dated November 24, 1941, for $19,799.97, is due at this office February 23rd. In accordance with arrangements which have been made between yourself and our Credit Department this note may be renewed for 90 days. A renewal note form is attached hereto for your signature. The interest on the old note from November 24th to February 23rd amounts to $250.25. Will you kindly return the signed renewal note with check for the interest to reach us by the due date of the note."

The Court: Is that all that was said.

Q. Do you have letters with which you transmitted these notes pursuant to the request in the letters which you have just read?

[fol. 112] A. I don't know whether the notes were just signed and sent, but I will look. Here is a letter:

"February 26, 1942, to the American Can Company, New York, Mr. A. W. Geier, Assistant Credit Manager. Dear Mr. Geier: Enclosed please find properly signed 90 day

renewal note to American Can Company, Southern in the amount of $7,039.25, and your note to the American Can Company to the amount of $19,799.97. We are enclosing our check in the amount of $339.21 to cover interest on these notes as follows:

| | |
|---|---|
| American Can Company, Southern, | $88.96 |
| American Can Company, | 250.25 |

Yours very truly, Bruce's Juices."

Letter dated April 22, 1940, it starts off:

"American Can Company to Mr. J. Adams Bruce, President, Dear Mr. Bruce: Referring to conversation in our office Friday, April 19th, and supplementing our letter of April 8th, we think we sent you two renewal notes, one for American Can Company, Southern, in the amount of $7,057.05, and one for American Can Company in the amount of $102,942.95, which two notes were proposed renewals of American Can Company, Southern, note dated March 1st, 1940 for $7,057.05 and the American Can Company note dated March 1st, 1940 for $107,784.60. In line with our conversation we are agreeable to letting these old notes ride along in their present amounts until such time as the matter discussed with Mr. Nugent and Mr. Jenkins can be finally adjusted, and if it is finally decided that there is any adjustment due you, the amount of such adjustment can be applied against the principal of the notes we are holding.

Very truly yours, J. A. Sarver, Credit Manager."

[fol. 113] Q. Now Mr. Bruce that was April 22, 1940?

A. Yes, sir, and these notes have been renewed constantly since this note agreement, and these notes themselves were renewed under this agreement, and Mr. Burger of the American Can Company, in sending us these notes, mentioned the agreement which had been in existence from April 22, 1940, and this agreement was referred to by Mr. Burger, Treasurer of the American Can Company, when he submitted these notes to us on February 12, 1942, which indicated that these notes were sent to us subject to the agreement which had been made April 22, 1940, and that the notes would carry on until an adjustment had been reached.

Q. Mr. Bruce, it is a fact is it not, that on April 22nd, 1940, the date of the letter you have read, the indebtedness represented by these notes was then in existence due by

Bruce's Juices to the American Can Company and represented by the predecessors of these notes.

A. It is admitted in the letter of April 22nd that these notes are in controversy, because this letter starts off, "Referring to conversation in our office Friday, April 19th, and supplementing our letter of April 8th which we sent you with the two renewal notes".

Q. At the time of this letter, and at the time of your conversation on the 19th of April, 1940, referred to in the lettter, this indebtedness already existed, and there have been notes signed from time to time?

A. Yes, sir, that is correct, and the renewal notes were the ones that were executed after the letter of April 22nd, 1940. Mr. Sarver's letter of April 22nd, 1940 fully explains what the renewal notes were, and under what circumstances they were renewed.

[fol. 114] Q. That is the controversy you refer to in the plea?

A. Yes, sir, and the size of the notes.

Q. Did you ever have a controversy with any other officials of the American Can Company other than Mr. Sarver, who wrote the letter?

The Court: Who else did you talk with about this same thing?

A. Mr. Nugent, Mr. Jenkins, Mr. Sarver, Mr. Geier, Mr. Howry, Mr. Roberts, Mr. Slayton and Mr. Taylor.

Q. Were those conversations over a period?

A. From early 1940 until the present time.

Q. But the indebtedness then represented by these notes *were* due prior to the first conversation in 1940?

A. You will notice I have only referred to D-1 and B-1. I have not touched A-1.

Q. For your information your 10th plea is identical with the 5th plea except it refers to that note held by the American Can Company, Southern at the time it was given?

A. This note started October 1st, 1941, and these notes were in existence prior to the discovery of the discrimination of the American Can Company and the American Can Company, Southern against us.

Q. Although this indebtedness that existed on the $7,000 and $19,000 notes prior to the first of 1940, at that date you discovered the discrimination and suggested some adjustment of the cause of it?

A. Yes, sir.

Q. And from that time on is when the controversy existed?
[fol. 115] A. Yes, sir.

Q. Were you asking the Can Company for a reduction because of the discrimination?

A. Yes, sir, as we were definitely damaged by it.

Q. If they had not discriminated, and if they had granted your request they would have been discriminating against the rest of your competitors in the territory.

Mr. Fowler: He is stating a premises that don't exist.

By Mr. Allison:

Q. Did you ever make any detailed claim for adjustment of credit in writing?

A. No, sir.

Q. Did you ever claim any definite amount?

A. No, I never claimed any definite amount until in March of 1942 I had a talk with Mr. Geier and suggested that the Can Company and Bruce's Juices should get together and settle this discrimination in the mutual interest of the Can Company and Bruce's Juices because we were very closely tied in together.

Q. Where was that conversation?

A. In Mr. Geier's office in the American Can Company of New York.

Q. Did you then make any request for a definite sum as adjustment?

Mr. Fowler: I object for this reason. This is evidently an endeavor to settle amicably a controversy, therefore the details should not be put in as binding on the parties as to amounts.

[fol. 116] The Court: I don't think that would be admissable in a trial of the case.

Mr. Allison: I am asking him if he ever made any definite request.

The Court: And his reply was that he tried to adjust it, to compromise it. I think when they get Mr. Bruce in New York and you are taking evidence you may come to that kind of an arrangement and settle it.

By Mr. Allison:

Q. I understand that the only officials you ever discussed the $7,000 and the $19,000 note with with reference to an adjustment of the claim for discrimination was Mr. Nugent,

Mr. Jenkins, Mr. Sarver, Mr. Geier, Mr. Roberts, Mr. Slayton and Mr. Taylor?

A. Those are the ones I discussed it with.

Q. While we are on this subject with reference to the 10th plea dealing with the $12,000 note to the American Can Company Southern, in what way is the allegation of that plea different from the 5th plea?

A. This note for $12,000 is entirely separate.

Q. The controversy you have related relates to the $7,000 and the $19,000 notes, and your conversation was with the same people although the $7,000 note is an American Can Company, Southern note?

A. Yes, sir.

Q. Now your fifth plea alleges that at the time the notes described in the first and second counts were given the controversy existed, and the $12,000 note is described in the first count?

[fol. 177] A. It is separate from the first.

Q. What are the facts concerning the note in controversy?

A. This note arose not through a renewal of these notes but through an extension of open account which was given during the summer of 1939, and ran as an open account until in the fall of 1941, when they asked us, for their convenience, to put that open account into the same form as these others were so as to get their records adjusted properly, and and as we were working entirely under this agreement here it was agreeable to us to do that so as to simplify the whole matter instead of same being carried as an open account, and the whole thing was put into notes.

Q. As a matter of fact you had been granted a line of credit not to exceed $125,000 by the American Can Company?

A. It was the original agreement in the fall of 1937.

Q. And thereafter your indebtedness exceeded that amount and these notes came into being in connection with that line of credit?

A. No, we were on open account until the fall of 1937 when they asked us to accept a line of credit, and instead of selling us on an open basis they sold us on a note basis, accepting notes, and we paid 5% interest from the invoice state instead of carrying it on a bed rock open account basis.

Q. That was not done at your request?

A. No, sir, we never requested that, and because of the service which the American Can Company had given us in

1937 we were leaving them and going to the Continental Can, and they offered us this proposition in the fall of 1937.

[fol. 118] Q. Mr. Bruce, do you recall a visit you made to New York requesting a line of credit, and a day or so later you returned to New York, and Mr. Nugent, and I believe Mr. Jenkins, called at your hotel room and told you that they had arranged to extend you a credit of $125,000, and you told them that was more than you expected they would give you?

A. Yes, sir, I remember that, I remember it was on a Sunday afternoon, and I never asked them for a line of credit, but they offered to extend me a line of credit, and I said, what is your idea, what do you propose, because I had my arrangements practically made with the Continental Can Company, and they said, we will figure it out and let you know, and they met me on a Sunday afternoon at my hotel and they told me they would extend me a $125,000 line of credit, and I told them that was more than I needed.

Q. And it was after this happened that you discovered the secret price in Texas?

A. Yes, sir. We discovered the discrimination in 1940.

Q. And the discrimination was based on the small can?

A. Yes, sir, on the small can of $9.68 price f. o. b. Houston.

Q. It was the 314 can you bought from Baltimore?

A. We bought from Baltimore in 1937 the 309, in 1938 and in January of 1939 we bought the 312, and from January, 1939 until the present time we bought the 314 can, and from May 19, 1939, we bought the 300 can.

Q. When you bought the 312 can from Baltimore was the Tampa factory of the plaintiff manufacturing that size?

[fol. 119] A. No, and so they gave us freight-equalized with Tampa while we were buying the 312 out of Baltimore, but when they were selling at the $9.68 price at Houston and at Baltimore they would not allow us the water rate of freight to Tampa on the 312 can, although they did on the other three sizes.

Q. Do you know whether the American Can Company ever sold the 312 can at f. o. b. points other than points of manufacture?

A. Actually yes, technically no. That is, in 1938 they sold us the 312 can f. o. b. Baltimore, and they allowed us water rate of freight to Tampa, which in effect made it f. o. b. Tampa.

Q. Is that the only instance you know of to your own knowledge?

A. No, there are other instances which I can recite.

Q. Of your own knowledge?

A. Yes, sir.

Q. What were they?

A. Selling the cans f. o. b. Baltimore freight allowed to Fairport, New York.

Q. That was a sale to you?

A. That is correct, which actually made the price f. o. b. Fairport, New York.

Q. Is that all?

A. There are other instances that I don't recall at the moment.

Q. Of sales to you or others?

A. Sales to others.

Q. Can you make that information available at a later hearing?

A. Yes, sir.

Q. During part of the time that all of this transpired which we have been inquiring about you maintained an office in New York yourself, did you not?

[fol. 120] A. We established an office in New York, a sales office in New York, in May of 1938.

Q. That was 100 Hudson Street?

A. Yes, sir. Then we moved to East 42nd Street in the fall of 1938, and left there in October, 1939 and came back to Tampa.

Q. Mr. Bruce, referring again to the controversy which you describe, where you claimed adjustment of alleged discriminations, at that time you have identified the $7,000 and $19,000 notes as being due or involved. Do I understand the indebtedness represented by the $12,000 note was involved in that controversy?

A. Yes, sir, this was contracted in the fall of 1939 as an open account.

Q. It ran on from 1939 as an open account until 1941, when it was put into a note?

A. Yes, sir.

Q. At that time there were other invoices due other than this suit here, by you to the American Can Company? That is correct, is it not?

A. Yes, sir.

Q. The $75,000 note, and otherwise?

A. Yes, sir.

Q. Isn't it a fact, Mr. Bruce, that the first occasion when you made any definite claim for an adjustment was in the spring of 1942 when you requested forgiveness of $50,000 of the indebtedness for the purpose expressed by you, to make your final statement more attractive, to interest new money, and to obtain credit from other suppliers, and nothing was said about discriminations?

A. No.

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[fol. 121] PLAINTIFF'S EXHIBIT A-1

150.00 2440

$12,000.00 Tampa, Fla., October 1, 1941.

Ninety Days after date we promise to pay to the order of American Can Company Twelve thousand and 00/100 Dollars at the office of American Can Co., 230 Park Ave., New York, N. Y. for value received with interest from date at the rate of five per cent per annum until paid.

Now, should it become necessary to collect this note through an attorney, either of us, whether maker, security or endorser on this note, hereby agrees to pay all costs of such collection, including a reasonable attorney's fee. The drawers and endorsers severally waive presentment for payment. Protest and notice of protest and non-payment of this note.

Bruce's Juices, Inc., by G. P. Peer, Asst. Treas.

No. ——
Due —— —, ——.

Dec. 30.
HK.

(On the back thereof) Paid Jan. 12, 1942 $150.00 interest.
Documentary Stamps: $10.00, $1.00, $1.00.

[fol. 122] PLAINTIFF'S EXHIBIT A-2

150.00 85

City: Tampa. State: Florida.

Date: December 30th, 1941.

Ninety days after date we promise to pay to the order of American Can Company Twelve Thousand and 00/100ths $12,000.00 payable at American Can Company, 230 Park Avenue, New York, N. Y. —— Value Received, with interest at 5 per cent per annum after date.

Bruce's Juices, Inc., by G. P. Peer, Ass't Treas.

No. ——. Due March 30, 1942.
AWG (Renews No. 2440.

(On Back Thereof)

For value received, — hereby guarantee payment of the within note at maturity, or at any time thereafter, with interest at the rate of — per cent per annum until paid, and hereby waive presentment for payment, Protest and Notice of Protest.

Paid Apr. 16, 1942. $150.00 Interest.

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PLAINTIFF'S EXHIBIT A-3

Renewal

151.67 572

$12,000.00. Tampa, Fla., March 30, 1942.

Ninety days after date we promise to pay to the order of American Can Company Twelve Thousand and 0/100 Dollars at the office of American Can Co., 230 Park Ave., New York, N. Y., for value received with interest from Date at the rate of Five per cent per annum until paid.

Now, should it become necessary to collect this note through an attorney, either of us, whether maker, security, or endorser on this note, hereby agrees to pay all costs of such collection, including a reasonable attorney's fee. The drawers and endorsers severally waive presentment for payment, protest and notice of protest and non-payment of this note.

Bruce's Juices, Inc., by G. P. Peer, Asst. Treas.

No. ——.
Due (Renews No. 85).

June 28, 29

[fol. 123] PLAINTIFF'S EXHIBIT B-1

247.50 491

City: Tampa. State: Florida.

Date: February 27, 1941.

Ninety (90) days after date we promise to pay to the order of American Can Company Nineteen thousand seven hundred ninety-nine and 97/100 Dollars, $19,799.97. Payable at American Can Company, 230 Park Avenue, New York, N. Y. Value Received, with interest at five percent per annum after February 27th, 1941.

Bruce's Juices, Incorporated, by G. P. Peer, Ass't Treas.

JES. P.

No.: Rnl. No. 3236. Due May 28th, 1941.

(On the Back Thereof)

For value received, — hereby guarantee payment of the within note at maturity, or at any time thereafter, with interest at the rate of — per cent per annum until paid, and hereby waive presentment for payment, Protest and Notice of Protest.

Paid May 20, 1941. 247.50 Interest.

PLAINTIFF'S EXHIBIT B-2

247.50 795

City: Tampa. State: Florida.

Date: May 28th, 1941.

Ninety (90) Days after date we promise to pay to the order of American Can Company Nineteen thousand seven hundred ninety-nine and 97/100 Dollars $19,799.97. Payable at American Can Company, 230 Park Avenue, New York, New York. Value Received, with interest at 5 percent per annum after May 28th, 1941.

Bruce's Juice's, Incorporated, by G. P. Peer, Ass't Treas.

No.: Renews Note 491.
Due Aug. 26, 1941.
HK.

[fol. 124] (On the Back Thereof)

For value received, — hereby guarantee payment of the within note at maturity, or at any time thereafter, with interest at the rate of — per cent per annum until paid, and hereby waive presentment for payment, Protest and Notice of Protest.

Paid Sept. 30, 1941. 247.50 Interest.

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PLAINTIFF'S EXHIBIT B-3

247.50. 2270

City: Tampa. State: Florida.

August 26th, 1941.

Ninety days after date we promise to pay to the order of American Can Company Nineteen thousand seven hundred ninety-nine and 97/100th $19,799.97. Payable at American Can Company, 230 Park Avenue, New York, N. Y. Value Received, with interest at 5 percent per annum after August 26th.

Bruce's Juices, Incorporated, by G. P. Peer, Ass't Treas.

No. —. Due Nov. 24, 1941.

AW 9 (Renews 795).

(On the Back Thereof)

Paid December 11, 1941. 247.50 Interest.

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[fol. 125] PLAINTIFF'S EXHIBIT B-4

332 2856

City: Tampa. State: Florida.

Date: November 24th, 1941.

Ninety days after date we promise to pay to the order of American Can Company, nineteen thousand seven hundred ninety nine and 97/100ths $19,799.97. Payable at American Can Company, 230 Park Avenue, New York, N. Y. Value

Received, with interest at 5 percent per annum after November 24th, 1941.

Bruce's Juices, Incorporated, by G. P. Peer.

No. Renewal 2270. Due Feb. 22/23, 1942.

JES. P.

(On Back Thereof)

For value received, —— hereby guarantee payment of the within note at maturity, or at any time thereafter, with interest at the rate of — per cent per annum until paid, and hereby waive presentment for payment, Protest and Notice of Protest.

Paid Mar. 2, 1942. 250.25 Interest.

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PLAINTIFF'S EXHIBIT B-5

332

City: Tampa. State: Florida.

Date: February 23rd, 1942.

Ninety days after date we promise to pay to the order of American Can Company, nineteen thousand seven hundred ninety-nine and 97/100ths. $19,799.97. Payable at American Can Company, 230 Park Avenue, New York, N. Y. Value Received, with interest at 5 percent per annum after date.

Bruce's Juices, Incorporated, by G. P. Peer, Asst. Treas.

No. Renewal 2856. Due May 24th/25, 1942.

(Reverse Side)

For value received, —— hereby guarantee payment of the within note at maturity, or at any time thereafter, with interest at the rate of — per cent per annum until paid, and hereby waive presentment for payment, protest and notice of protest.

Paid May 28, 1942. 250.25 Interest.

[fol. 126] PLAINTIFF'S EXHIBIT C-1

328.49 2761

$27,184.60 JES August 31, 1940.

Ninety Days after date I, we or either of us promise to pay to the order of American Can Company, Twenty Seven Thousand One Hundred Eighty Four and 60/100 Dollars. At the office of American Can Company, 230 Park Ave., N. Y. C. for value received with interest from 9/3/40 at the rate of five per cent per annum from Sept. 3 until paid.

Now, should it become necesary to collect this note through an attorney, either of us, whether maker, security or endorser of this note, hereby agrees to pay all costs of such collection, including a reasonable attorney's fee. The drawers and endorsers severally waive presentment for payment. Protest and Notice of Protest and non-payment of this note.

Bruce's Juices, Inc., J. Adams Bruce, Pres. (Seal.)

Nov. 29.

No. ——. Due —— —, ——.

Renews part of #808, 1400.00. Renews part of #1100, 25784.60.

(On the Back Thereof)

Paid Dec. 13, 1940. 328.49 Interest.

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PLAINTIFF'S EXHIBIT C-2

339.81 3236

City: Tampa. State: Florida.

Date: November 29th, 1940.

Ninety (90) days after date we promise to pay to the order of American Can Company, twenty-seven thousand one hundred eighty-four and 60/100 Dollars $27,184.60. Payable at American Can Company, 230 Park Avenne, New York, New York. Value Received, with interest at five per cent per annum after November 29th, 1940.

Bruce's Juices, Incorporated, by G. P. Peer, Ass't Treas.

No. (Renewal 2761). Due February 27, 1941.

AWG.

[fol. 127] (On the Back Thereof)

For value received, — hereby guarantee payment of the within note at maturity, or at any time thereafter, with interest at the rate of — per cent per annum until paid, and hereby waive presentment for payment, Protest and Notice of Protest.

Credited Dec. 31, 1940, $7384.63. Paid Mar. 13, 1941, $280.32. Int. to 2/27.

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PLAINTIFF'S EXHIBIT D-1

85.05 3-34

$7,039.25 JES. August 31, 1940.

Ninety Days after date I, we or either of us promise to pay to the order of American Can Company Southern, Seven Thousand Thirty Nine and 25/100 Dollars. At the office of American Can Co. Southern, 230 Park Ave., N. Y. C. for value received with interest from 9/3/40 at the rate of five per cent per annum from Sep. 3 until paid.

Now, should it become necessary to collect this note through an attorney, either of us, whether maker, security or endorser of this note, hereby agrees to pay all costs of such collection, including a reasonable attorney's fee. The drawers and endorsers severally waive presentment for payment. Protest and Notice of Protest and Non-Payment of this note.

Bruce's Juices, Inc., by J. Adams Bruce, Pres. (Seal.)

Nov. 29.

No. ——. Due —— —, ——.

Renews S-224.

(On the Back Thereof)

Paid Dec. 13, 1940. 85.05 Interest.

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[fol. 128] PLAINTIFF'S EXHIBIT D-2

87.99 S-372

City: Tampa. State: Florida.

Date: November 29, 1940.

Ninety (90) days after date we promise to pay to the order of American Can Company, Southern, Seven thou-

sand thirty-nine and 25/100 Dollars — $7,039.25. Payable at American Can Company, 230 Park Avenue, New York, New York. Value Received, with interest at five percent per annum after November 29th, 1940.

Bruce's Juices, Incorporated, by G. P. Peer, Ass't Treas.

No. Renewal S-341. Due February 27, 1941.
AWG.

(On the Back Thereof)

For value received, —— hereby guarantee payment of the within note at maturity, or at any time thereafter, with interest at the rate of — per cent per annum until paid, and hereby waive presentment for payment, Protest and Notice of Protest.

Paid Mar. 13, 1941. Interest to Maturity, 87.99.

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PLAINTIFF'S EXHIBIT D-3

87.99 S-130

City: Tampa. State: Florida.

Date: February 27th, 1941.

Ninety (90) days after date we promise to pay to the order of American Can Company, Southern, Seven thousand thirty-nine and 25/100 Dollars — $7,039.25. Payable at American Can Company, Southern, 230 Park Avenue, New York, N. Y. Value Received, with interest at five percent per annum after February 27th, 1941.

Bruce's Juices, Incorporated, by G. P. Peer, Ass't Treas.

No. Rnl. S-372. Due May 28, 1941.
JES. P.

[fol. 129] (On the Back Thereof)

For value received, —— hereby guarantee payment of the within note at maturity, or at any time thereafter, with interest at the rate of — per cent per annum until paid, and hereby waive presentment for payment, Protest and Notice of Protest.

Paid May 20, 1941. 87.99 Interest.

PLAINTIFF'S EXHIBIT D-4

87.99 S-190

City: Tampa. State: Florida.

Date: May 28th, 1941.

Ninety (90) Days after date we promise to pay to the order of American Can Company, Southern, Seven Thousand thirty-nine and 25/100 Dollars—$7,039.25. Payable at American Can Company, Southern, 230 Park Avenue, New York, New York. Value Received, with interest at 5 percent per annum after May 28th, 1941.

Bruce's Juices Incorporated, by G. P. Peer, Ass't Treas.

No. Renews Note S-130. Due August 26, 1941.
HK.

(On the Back Thereof)

For value received, —— hereby guarantee payment of the within note at maturity, or at any time thereafter, with interest at the rate of — per cent per annum until paid, and hereby waive presentment for payment, Protest and Notice of Protest.

Paid Sept. 30, 1941. 87.99 Interest.

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[fol. 130] PLAINTIFF'S EXHIBIT D-5

87.99 S-301

City: Tampa. State: Florida.

Date: August 26th, 1941.

Ninety days after date we promise to pay to the order of American Can Company, Southern, Seven thousand thirty-nine and 25/100ths—$7,039.25. Payable at American Can Company, Southern, 230 Park Avenue, New York, N. Y. Value Received, with interest at 5 percent per annum after August 26th.

Bruce's Juices, Incorporated, by G. P. Peer, Ass't Treas.

No. ——. Due No. 24, 1941.
AW. G. (Renews S-190.)

(On the Back Thereof)

Credited Dec. 11, 1941. 87.99 Interest.

PLAINTIFF'S EXHIBIT D-6

S-71 88.96 S-330

City: Tampa. State: Florida.

Date: November 24th, 1941.

Ninety days after date we promise to pay to the American Can Company, Southern, Seven thousand thirty-nine and 25/100ths $7,039.25. Payable at American Can Company, Southern, 230 Park Avenue, New York, N. Y. Value Received, with interest at 5 percent per annum after November 24th, 1941.

Bruce's Juices, Incorporated, by G. P. Peer, Ass't Treas.

No. Rnl.—S 301. Due Feb. 22/23, 1942.
JES. P.

[fol. 131] (On the Back Thereof)

For value received, —— hereby guarantee payment of the within note at maturity, or at any time thereafter, with interest at the rate of — per cent per annum until paid, and hereby waive presentment for payment, Protest and Notice of Pro-est.

Credited Mar. 2, 1942. $88.96 Interest.

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PLAINTIFF'S EXHIBIT D-7

S-71

City: Tampa. State: Florida.

Date: February 23rd, 1942.

Ninety days after date we promise to pay to the order of American Can Company, Southern, Seven thousand thirty-nine and 25/100th — $7,039.25. Payable at American Can Company, Southern, 230 Park Avenue, New York, N. Y. Value Received, with interest at 5 percent per annum after date.

Bruce's Juices, Incorporated, by G. P. Peer, Asst. Treas.

No. Renews S-330. Due May 24/25, 1942.

(Reverse Side)

For value received, —— hereby guarantee payment of the within note at maturity, or at any time thereafter, with interest at the rate of — per cent per annum until paid, and hereby waive presentment for payment, protest and notice of prbtest.

Paid May 28, 1942. 88.96 Interest.

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Plaintiff's Exhibit E-1, filed for identification, letter from Wilkins & Harvey, to American Can Company, dated October 31, 1941, is included in the record at page 472.

Plaintiff's Exhibit E-2, list of Notes Payable, Secured, of Bruce's Juices, Incorporated, dated August 31, 1941, included in the record at page 474.

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[fol. 132] In Circuit Court of Hillsborough County

Depositions of Witnesses Taken Pursuant to Notice of Taking Testimony Pursuant to Pre-trial Conference Order Dated February 25, 1943, at the Office of American Can Company, 230 Park Avenue, New York City, on April 1st and 2nd, 1943.

Appearances:

John M. Allison, Esq., Attorney for Plaintiff;
Morgan J. Callahan, Esq., Of counsel.
Cody Fowler, Esq., Attorney for Defendant.

Mr. Fowler: I might state that this matter comes on for the taking of testimony in accordance with notice and stipulation now presented, in which it will be noted that the taking of the testimony before a notary public or a commissioner has been waived, and it is stipulated and agreed that either counsel may cause witnesses to be sworn.

The reporter taking the testimony, Mr. Clarence Bonynge, however, being a notary, will swear the witnesses by agreement of counsel present.

Mr. Callahan: It is the company's understanding that this examination and the depositions to be taken pursuant to the notice of examination are being conducted for the purpose of apprising Judge Parks, before whom this case is pending in the Thirteenth Judicial Circuit, Florida.

Since the receipt of the notice the company has conducted extensive researches through its records and has spent considerable time and effort in an endeavor to comply with the [fol. 133] notice of examination and to make available for the court the information requested within the scope of the plea set forth in the defendant's answer.

The nature of the notice of the examination being so broad in scope, it has been difficult if not impossible for the company to ascertain with any definiteness the precise nature and scope of the examination which the defendant seeks to make of the plaintiff. The company has expended time and effort and money in connection with the preparation for this deposition. I know of my own knowledge that a conservative estimate of the time and effort expended and out of pocket expenses amount to at least $5,000.

In the notice of examination served by the defendant it is stated, among other things, that an examination is sought concerning manufacturing costs. In an endeavor to save time and to eliminate as much as possible any unnecessary examination or to unduly prolong this examination the plaintiff offers the following concession on the record:

> It is conceded by the plaintiff for the purpose of this action and plaintiff hereby offers to stipulate that during the times alleged in the defendant's pleas packers' cans were manufactured by the plaintiff in its various factories in quantity and were shipped out to different customers as ordered, and that during said period there was no difference in the prices of packers' cans of like size, grade and quality sold by plaintiff to customers in the United States east of the Western boundary line of the States of Montana, Wyoming, Colorado and New Mexico based upon any difference in the cost of manufacture, but that any and all dif- [fol. 134] ferentials in the price of such cans sold to customers within the area and the period of time above mentioned are claimed by plaintiff to be justified in order to meet competition or by reason of differences in the cost of selling or delivering and not of manufacturing.

Plaintiff likewise concedes and offers to stipulate that in the territory of the State of Utah, in the territory in the

United States west of the western boundary line of the States of Montana, Wyoming, Utah and New Mexico, and in the territory of the Hawaiian Islands, respectively, plaintiff claims similar conditions prevailed with respect to the packers' cans sold by plaintiff in the said three last mentioned territories, respectively; and that the scale of prices of packers' cans in the said three territories, respectively, was slightly higher than that in the easter- part of the United States, which plaintiff claims was due to the higher cost of tin plate delivered at plaintiff's factories in said three last mentioned territories, respectively.

Mr. Fowler: In reference to the very interesting statement made by Mr. Callahan let me state that the defendant deeply regrets that the American Can Company found it so difficult to get the information from their records regarding the transactions with its customers and that they were put to the large expenditure of $5,000; but we are glad to feel that this will not be any great blow to the American Can Company.

We further mention the fact that suits now in this court on promissory notes against the defendant which will be affected by the facts developed at this hearing, according to the addammum clause amount to some $150,000.

[fol. 135] Defendant accepts the stipulation of fact as set forth in the first part of the statement made by Mr. Callahan as to what was conceded by the plaintiff, and likewise accepts the statements of plaintiff's claims as set forth in the remaining portion of his statement as read by Mr. Callahan.

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Allen Herbert Nugent, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Fowler:

Q. What position do you occupy with the American Can Company, Mr. Nugent?

A. General manager of sales, packers' cans.

Q. By packers' cans tell us very generally what you mean.

A. Well, it is that type of can that is used for fruits and vegetables, or what we might say in general terms processed products.

Q. Have you held that position with the American Can Company since June 19, 1936?

A. No, sir, I have not.

Q. You have not?

A. No.

Q. How long have you held your present position?

A. Since September of 1936.

Q. September, 1936?

A. Yes.

Q. Before that time were you with the American Can Company?

A. Yes, sir.

[fol. 136] Q. How long have you been with the American Can Company?

A. It will be 36 years in April.

Q. What position did you have between June 19th and the date in September when you took your present position?

A. I was assistant general manager of sales.

Q. I take it that you are acquainted with the defendant Bruce's Juices, Inc.?

A. Yes, sir.

Q. How long have you been acquainted with that corporation?

A. Since 1937 I would say.

Q. Before that time you were not familiar with it?

A. I knew of the company.

Q. Where are the branches of American Can Company located?

A. Do you mean factories of the American Can Company?

Q. First I would like to know the factories and the distribution points.

(Discussion off the record.)

Mr. Callahan: I have here a map dated February 3, 1941, showing the distribution of factories of the American Can Company on that date throughout the continental United States. Some of the factories shown on the map which I have before me are now temporarily closed, due to various restrictions imposed by federal government.

Mr. Fowler: I will ask that this map presented by Mr. Callahan be marked as Defendant's Exhibit 1; and I ask

that it be made part of the record. Have you any objection?

Mr. Callahan: No objection.

[fol. 137] Map of the United States showing locations of factories of American Can Company, dated February 3rd, 1941, was marked Defendant's Exhibit No. 1, April 1, 1943 C. B. (which exhibit will be certified and presented to the Court under proper procedure).

Q. Do you accept Mr. Callahan's statement as your answer?

A. Yes.

Mr. Fowler: If you care to, Mr. Callahan, you may later in this hearing introduce a detailed statement as to the factories which are closed.

Mr. Callahan: That is agreeable.

Mr. Fowler: Together with the date that each factory was closed.

Mr. Callahan: Yes.

Q. In addition to the factories which you have do you not have what are known in substance as distributing points where you maintain warehouses for the delivery of cans?

A. Yes, we have a few.

Q. Am I correct in stating that you have factories or distributing points in 25 states of the Union?

A. 25 states, yes. I have not checked it myself to see that we have that many factories. In my opinion it is correct, but I will check it and if I find it is wrong I will correct it.

Q. Mr. Nugent, to clarify this little map won't you explain the legends on the same?

A. Where the capital letters P. C. are used that means that that factory produces packers' cans; where the capital letters G. L. are used it means that that particular factory produces general line cans; where the combination of capital P. C. and capital G. L. are used it means [fol. 138] that that factory produces both packers' cans and general line cans.

Where the capital letters S. S. are used it means that at that point we have a sorting station.

Where the capital letters F. M. are used it means that we produce fibre milk cans at that point.

Where the capital letters F. C. are used it means a fibre can factory.

Where the capital letters H. C. are used it means that we manufacture what are known as hole and cap cans, or bent filler type for evaporated milk.

Where the capital letters E. P. are used it means that in that plant we carry on engraving and process work.

Q. Then you do have a plant as referred to on the map in the state of Texas, do you not?

A. Yes, sir.

Q. That is at Houston?

A. At Houston, Texas.

Q. That is operating under the name of American Can Company Southern, is it not?

A. Yes, sir.

Q. Have you been reasonably familiar with the business of Bruce's Juices since you became sales manager?

A. Yes, sir.

Q. You know as a matter of fact that except for one or two occasions which I will mention in a moment and of which you are aware, that Bruce's Juices have purchased all of their cans from the American Can Company, do you not?

[fol. 139] Mr. Callahan: If you know that, Mr. Nugent. If you do not know that say so.

A. So far as I know.

Q. So far as you know they have?

A. They have.

Q. Now you made contracts with Bruce's Juices on a yearly basis, is that correct?

A. No, sir.

Q. How did you make contracts with Bruce's Juices for the purchase of cans?

A. Bruce's Juices usually signed what are known as our term contracts, which are usually for a period of three years.

Q. That contract is the contract that you used with your customers throughout the United States?

A. No, sir, that was the contract that was used in the territory east of the Rocky Mountains; I think Bruce's Juices are now in Florida; they had a different type of

contract even in the territory east of the Rocky Mountains than they had in the state of Texas.

Q. Then that was a form of contract that you used in the United States east of the Rocky Mountains except in the state of Texas, is that right?

A. Yes, sir. By east of the Rocky Mountains I mean that line west of the——

Mr. Fowler: If you want to refresh his memory, Mr. Callahan, you may do so.

The Witness: East of the western boundary line of Montana, Wyoming, Colorado and New Mexico, except Alabama, Mississippi, Louisiana and Texas.

[fol. 140] Q. Those last southern states you just mentioned were served through the American Can Company Southern, were they not?

A. Yes, sir.

Q. Have you the form of contract which you made with the purchasers of cans from the American Can Company in this territory for the year 1942?

A. Yes.

Q. I hand you a contract form of the American Can Company, being form 3,013 Disc. 7-1937-10,000. I note this is dated 1937. I ask you if that is the form contract used for the sale of cans to your customers in the United States east of the line you described a few minutes ago, and excepting only the states you enumerated in that territory a few minutes ago.

A. For packers' cans, yes.

Q. Now all cans purchased by Bruce's Juices during the period of time we have mentioned, that is from June 19, 1936, to and until the present time, have been packers' cans, have they not?

A. As far as I know, yes.

Q. All cans used in which fruits and vegetables and fruit and vegetable juices are packed or canned are known as packers' cans, are they not?

A. That is not quite true.

Q. Well then, you state what packers' cans are.

A. Packers' cans are those sizes of round Sanitary cans up to and including what is known as the full gallon can, going from the smallest diameter up to the full gallon can, which has the dimensions of 6-3/16ths by 8-12/16ths. Now

there are some larger cans used for certain juices which are known as general line cans, such as the five gallon square.

[fol. 141] Mr. Fowler: I will ask that this contract form previously identified by its number be introduced as part of this record as Exhibit 2. Have you any objection?

Mr. Callahan: No objection.

Term Contract for Sanitary cans, Form 3013 Disc.—7-1937, was marked Defendant's Exhibit No. 2, April 1, 1943 C. B. (which exhibit will be certified and presented to the court under proper procedure).

Q. In selling your cans and making contracts for the sale of your cans you fill in the date and the name of the party of the second part and execute it, and that was all that was required to be done to make it a complete contract, is that correct?

A. No, sir, that is not quite correct. The date of the contract is filled in, the name of the buyer, who is the party of the second part, the term of the contract; and then if the salesman in the field signs for the company, then the contract is sent in to New York, 230 Park Avenue, for acceptance by the company.

Q. 230 Park Avenue is the general office of the American Can Company and its subsidiaries, is it not?

A. Yes.

Q. That is the point where we are at this moment?

A. That is right.

Q. Mr. Nugent, to save time let me ask you if you have the contract forms used by the American Can Company with its customers since June 19, 1936, and if so I will ask you to produce the same.

Mr. Callahan: I have here and offer to you blank forms of all the contracts used by American Can Company at one time or another from June 19, 1936, to date. Each of the contract forms bears a number in the upper left hand corner and a date. We shall furnish you with a [fol. 142] table showing when the particular form number was in actual use, as part of this deposition. The forms of course include those used by American Can Company's wholly owned subsidiaries, namely, American Can Company Southern and American Can Company of Massachusetts.

The Witness: That date up in the corner is the date when the contract was printed.

Mr. Fowler: I will ask you to kindly produce that list as just outlined by you; and I now offer in evidence the other 27 forms in addition to the one heretofore offered in evidence and ask that the same be marked as Defendant's exhibits.

Forms of packers' can contracts were marked Defendant's Exhibits as follows:

| Exhibit | Form No. | Printed |
|---|---|---|
| 3 | 3013 Fla. Disc. | 11-1936 |
| 4 | 3013 Disc. | 11-1936 |
| 5 | 3013 Disc. | 10-1939 |
| 6 | 3013 Disc. | 7-1942 |
| 7 | 3013 Disc. | 12-1942 |
| 8 | 3035 Disc. | 11-1936 |
| 9 | 3035 Disc. | 7-1937 |
| 10 | 3035 Disc. | 10-1939 |
| 11 | 3035 Disc. | 12-1939 |
| 12 | 3035 Disc. | 7-1942 |
| 13 | 3035 Disc. | 12-1942 |
| 14 | 3035 Disc.-Texas | 10-1939 |
| 15 | 3035 Disc.-Texas | 12-1939 |
| 16 | 3035 Disc.-Texas | 7-1942 |
| 17 | 3035 Disc.-Texas | 12-1942 |
| 18 | 3036 | 11-1936 |
| [fol. 143] | | |
| 19 | 3036 | 10-1939 |
| 20 | 3038 | 11-1936 |
| 21 | 3038 | 10-1939 |
| 22 | 3038 | 7-1942 |
| 23 | 3038 | 12-1942 |
| 24 | 3038½ | 11-1936 |
| 25 | 3038½ | 10-1939 |
| 26 | 3038½ | 7-1942 |
| 27 | 3038½ | 12-1942 |
| 28 | Hawaiian Island Special agreement | (Typed) |
| 28-A | Hawaiian Island Special agreement | (Typed) |

(Which exhibits will be certified and presented to the court under proper procedure.)

Mr. Fowler: I offer in evidence likewise the schedule which you produce showing the dates of the use of the respective forms, and ask that that be introduced in evidence and marked Exhibit 29.

Schedule later produced by Mr. Callahan, headed "Packers' can contract blank forms" was marked Defendant's Exhibit No. 29, April 1, 1943, C. B. (which exhibit will be certified and presented to the court under proper procedure).

Q. Do you have quickly at your disposal the amount of cans purchased by Bruce's Juices during 1936 and on through 1942?

A. Yes, sir, I think I do.

Q. Will you kindly tell us the purchases by Bruce's Juices during those various years?

[fol. 144] A. I do not have the purchases from June 19, 1936, to the end of that year. I have the figures for subsequent years.

Q. Will you please just read those and state each year and the amount?

A. The gross purchases of Bruce's Juices from the American Can Company were as follows:

| | American Can Company | | American Can Company Southern | | |
|---|---|---|---|---|---|
| | Gross | Net | Gross | Net | Refund |
| 1937 | $262,093.04 | 262,093.04 | 27,440.70 | 27,440.70 | 0 |
| 1938 | 306,953.16 | 297,933.82 | 54,566.41 | 52,826.79 | 10,758.96 |
| 1939 | 450,133.62 | 441,131.14 | 81,856.76 | 80,219.62 | 15,853.33 |
| 1940 | 369,333.63 | 361,949.01 | 0 | 0 | 7,384.63 |
| 1941 | 274,244.01 | 268,759.13 | 0 | 0 | 5,484.88 |
| 1942 | 293,517.78 | 293,517.78 | 0 | 0 | 0 |

I would like to add that these figures were prepared by one of the men in my department, that is the general sales packers' cans department, and were handed to me, and I would like our auditing department to check them.

Q. If you find anything wrong with them you will notify us in writing as to the correction that you desire?

A. Yes, sir.

Q. Will you likewise get the purchases for 1936 or from June 19, 1936, to the end of the year, as you prefer?

A. Yes, sir, I shall get the figures for the period from June 19, 1936, to December 31, 1936, inclusive.

Q. And give them to us for the record here?

A. Yes, I will give them to you.

[fol. 145] Q. Thank you, sir. Now Mr. Nugent, when did your company first sell any cans which are known in the trade as the little cans, which are the cans used for distribution of juices, to the beverage trade?

A. I cannot recall definitely, although I think it was in 1935. I can check that.

Q. Well, that is all right, if you want to correct it of course you can after checking your records. Do you recall to whom you first sold those little cans?

A. Yes, sir.

Q. Will you state, please?

A. W. B. Haggerty.

Q. He put out a little can under the name of "Nulabel" didn't he?

A. I cannot answer that now. I have a can in my office from which I can get that information.

Q. How long did he stay in the business, if you know, Mr. Nugent, of selling these little cans?

A. I am unable to answer that.

Q. To refresh your memory I will ask you if he did not make purchases for just a very few months and then cease purchasing little cans from you.

A. Yes, sir, I would say that is true.

Q. To whom did you next sell little cans, if you recall?

A. I am quite sure Bruce's Juices.

Q. And Bruce's Juices have bought cans from you since that time up to and through 1942?

A. Yes, sir, packers's cans.

Q. Do you know what percent of the cans Bruce's Juices purchased were packers's cans?

[fol. 146] A. What percentage of the total?

Q. Yes, in your opinio...

A. I can only answer from the standpoint of packers' can size.

Q. With your familiarity with the business of Bruce's Juices and your handling of its account what in your opinion was the percentage of packers' cans that it used to the gross amount of cans which it purchased?

A. As far as I know 100 per cent.

Q. Now, Mr. Nugent, I will ask you if the following corporations were not customers of yours in the purchase of cans during this period of time, that is from June 19, 1936,

through 1942, or at least a part of that period: Engelman Gardens, Edenboro, Texas?

A. Yes, sir.

Q. Border Packing Company, Brownsville, Texas?

A. I am not sure about Border Packing Company; I will have to check that.

Q. Will you check it and let us know?

A. Yes, sir.

Q. California Packing Corporation?

A. Yes, sir.

Q. Stokeley Brothers & Company, Inc.?

A. Yes, sir.

Q. Hawaiian Pineapple Company, Ltd.?

A. Yes, sir.

Q. Libby, McNeill and Libby, Inc.?

A. Yes, sir.

Q. Morgan Packing Company?

A. Yes, sir.

[fol. 147] Q. The Great Atlantic & Pacific Tea Company?

A. Yes, sir.

Q. Taormino Corporation?

A. Yes, sir.

Q. Of Donna, Texas?

A. Yes.

Q. Now during the time mentioned American Can Company of course knew that Bruce's Juices was canning and selling fruit and vegetable juices both in large cans, that is cans for the grocery trade, and since the season of 1936-1937 juices, both vegetable and fruit, to the beverage trade in little cans, did you not?

A. I do not know what you mean by large cans.

Q. I mean by large cans, cans other than those designated as little cans, Mr. Nugent.

A. I did not know that they were selling vegetable juices in large cans; I knew that they were selling fruit juices in the larger cans.

Q. You knew that they were selling fruit juices in larger cans?

A. Yes, sir.

Q. And you do not know that they were selling vegetable juices in larger cans?

A. That is right.

Q. But you do know that they were selling both vegetable and fruit juices in the smaller cans, little cans?

A. From June 19, 1936?

Q. Well, not constantly, but since that period of time, since the 1936-1937 season. In referring to the little can I refer to the can of the 2.02 diameter and to the large cans as all cans purchased by Bruce's Juices with a diameter other than 2.02.

[fol. 148] A. I cannot remember as to whether they were packing vegetable juices, including tomato juice, in the period back to June 19, 1936, to 1940, I have just forgotten.

Q. You do know then that they were packing fruit juice during that period of time in small cans?

A. Citrus juices.

Q. And you do know that during at least a substantial part of that time they were canning vegetable juice, considering tomatoes vegetables?

A. Part of the time do you say?

Q. During a good portion of that time.

A. Yes, part of that time.

Q. You know, do you not, as a matter of fact that they did can tomato juice during that period in Florida?

A. No, I do not.

Q. Do you know whether or not they canned in Vincennes, Indiana, tomato juice?

A. Only by hearsay.

Mr. Callahan: You either know or you do not know, Mr. Nugent. If you do, say so; and you do not, say so.

The Witness: I don't know.

Q. You state you do not know of your own knowledge?

A. That is correct.

Q. As a matter of fact most of this evidence you do not know of your own knowledge, but it comes from the records of your company, does it not?

Mr. Callahan: Most of what evidence, Mr. Fowler?

[fol. 149] Q. Most of the evidence you have given this morning, particularly regarding accounts, is not evidence you know from your own personal knowledge but have

acquired in your official position from your experience with your company, is not that correct?

Mr. Callahan: I will object to that statement, and I will tell you why. Mr. Nugent's answers stand on their own. He has stated that certain records of accounts were prepared for his purposes.

Mr. Fowler: O. K. we will get that. I will withdraw the question.

Q. Mr. Nugent, since you do not know, will you examine the records of the American Can Company and tell us whether or not your company sold cans to Bruce's Juices to can tomato juice in New York in the year 1938?

Mr. Allison: To which line of questioning the plaintiff objects for the reason that it seeks information which lies as fully, if not more so, within the knowledge of the defendant as within the knowledge of the plaintiff, and therefore unreasonably extends the record.

Mr. Fowler: For the purposes of the record I will explain that while it is true that the defendant of course knows where it purchased cans and for what purpose, that this question is a basis for obtaining information regarding charges made to the defendant for such cans for the purpose of claiming discrimination. I now renew my question to the witness.

Mr. Allison: Let plaintiff add the further ground of objection that for the purpose stated by counsel it appears immaterial what was packed in the cans, but the question goes to the sale of cans themselves.

[fol. 150] Mr. Fowler: For the purposes of the record it shows the knowledge of the witness and generally the transactions between the American Can Company and the defendant. I will also add that it is material what is packed, for the purpose of showing competition of other customers of the American Can Company.

Mr. Allison: Let me add one thing in connection with that. Plaintiff objects further to the form of the question inasmuch as this witness has testified as to the cans and not necessarily as to the purposes for which purchasers of cans may have used the same.

Mr. Fowler: Do you wish to instruct the witness not to answer?

Mr. Allison: No.

(Question read by the reporter.)

Q. I will add, to refresh your memory, that the cans were delivered at Geneseo, New York.

A. We sold cans to Bruce's Juices for shipment to Geneseo, New York, in one of the years during the period, but I have forgotten the year and I would have to check the records. I mean by that that I do not know whether it was the year 1938.

Q. I will ask you if it was not two years, and that the years were 1938 and 1939—do you know?

A. I would have to check the records. I have nothing here to show those years.

Q. Then if that is not correct will you state it in the record later during this hearing?

A. Yes, sir.

Mr. Allison: Do you mean that in the years 1938 and 1939 are not the correct years during which the American Can Company sold cans to Bruce's Juices delivered at Geneseo, New York?

[fol. 151] Mr. Fowler: Exactly.

Q. I will ask you further if you did not know that they purchased those cans, delivered to Geneseo, for the purpose of canning tomato juice.

Mr. Allison: The plaintiff renews its objection heretofore stated to the form of the question as it relates to the purpose for which the defendant may have used the cans or may have advised the plaintiff it intended to use the cans, as that lies peculiarly within the knowledge of the defendant.

A. I would say that I was informed by Mr. Bruce that that is what the cans were to be used for.

Q. I will ask you if the tops of the cans so sold in Geneseo above mentioned did not bear the words "tomato juice" on them.

A. To the best of my knowledge they did.

Q. I will ask you if in the season of 1939 Bruce's Juices did not purchase cans of the American Can Company delivered in Bridgeville, Delaware, for the purpose of using the cans in the canning of tomato juice.

Mr. Allison: The plaintiff objects to the form of the question for the reason that it seeks to elicit information as to the purpose for which the cans may have been used, it not having previously been shown that this witness has any knowledge of such purpose.

Mr. Fowler: The witness can simply say he has no knowledge.

Mr. Callahan: You are asking two questions, Mr. Fowler. Ask him one first, whether they shipped the cans.

[fol. 152] Q. I will ask whether or not the American Can Company shipped cans to Bruce's Juices at Bridgeville, Delaware, in the year 1939.

A. To what company?

Q. For the account of Bruce's Juices.

Mr. Callahan: You can answer that yes or no, if you know.

A. To the best of my knowledge we shipped cans to a canner at the point mentioned for the account of Bruce's Juices, but I do not know or have any record here of the year in which those cans were shipped.

Q. I will ask you if the canner you refer to was not H. B. Cannon & Son.

A. I think that is correct.

Q. Will you state whether or not you had been informed or knew that the cans were purchased by Bruce's Juices or for their account for the purpose of canning tomato juice under their label?

Mr. Callahan: The form of that question is objected to.

Mr. Allison: The plaintiff objects to the question for its form on the several grounds heretofore enumerated, and for the further reason that the information sought not only lies within the knowledge of the defendant but that it is immaterial and irrelevant in this cause.

(Question read by the reporter.)

A. I was told by Mr. Bruce that the cans would be used for tomato juice. I want to make it clear in answering this question that I am referring to the 2.02 diameter, known as the small cans, as referred to previously as the small can.

[fol. 153] Q. I will ask you, you knew, did you not, that the order for these cans to be shipped to Bridgeville, Delaware, provided that they were to be marked "tomato juice"?

A. I did not see the orders personally and I do not know whether that is true.

Q. All the cans that you sold to Bruce's juices were lithographed, were they not—all the 2.02 cans you sold Bruce's Juices were lithographed, were they not?

A. To the best of my knowledge they were.

Q. And that lithographing bore the name of the type of juice that was to be contained in the can, did it not?

A. To the best of my knowledge that is true.

Q. You are in charge of all sales and in charge of the orders that are taken for cans, are you not, since the period of time you mentioned?

A. I am in charge of sales, but I do not see all the orders that are issued in the district.

Q. I will ask you if you know that in 1940 Bruce's Juices carried on some canning of tomato juice, using the 2.02 can, in Vincennes, Indiana.

Mr. Allison: The plaintiff renews its objection to these questions since they all seek information which lies peculiarly within the knowledge of the defendant, and the questions merely *unburden* the record.

Mr. Fowler: I might add, as do the voluminous objections.

A. I would like to ask for the name of the company, the canning company, located at Vincennes, Indiana.

Q. Vincennes Packing Corporation.

[fol. 154] A. This company is not a customer, nor was it at that time, of the American Can Company.

Q. Now, will you kindly answer the question as to whether or not you knew of this enterprise as above asked?

A. Only by hearsay—not of my own knowledge; I will have to put it that way.

Q. I will ask you if you did have some conferences with Mr. Bruce—and if that does not refresh your memory I will give you more details—regarding the purchase of cans for this operation.

Mr. Allison: To this line of questioning the plaintiff renews its objections, with the further observation that at the time the trial court was advised these depositions would be sought it was stated the purpose thereof was to seek information more peculiarly within the knowledge of the plaintiff than the defendant; and these questions apply to knowledge which lies more with the defendant than with the plaintiff.

Mr. Fowler: I will point out that the knowledge on the part of the American Can Company of the operations of Bruce's Juices and where it packed and sold tomato and other juices had a direct bearing on their knowledge as to which corporations competed with Bruce's Juices in the markets, and therefore has a direct bearing on discriminations affecting the illegality of the transactions referred to in the defendant's pleas in this cause.

(Question read by the reporter.)

A. Not to my knowledge.

Q. I will ask you further if it was not agreed between you and Mr. Bruce, representing Bruce's Juices, that in this particular operation of Bruce's Juices, irrespective of your contract, that these cans might be purchased from Continental Can Company.

[fol. 155] Mr. Callahan: Which particular operation?

Mr. Fowler: The particular operation referred to in the previous questions which referred to the canning of tomato juice by Vincennes Packing Corporation, Vincennes, Indiana, in the year 1940.

(Question read by the reporter.)

Mr. Allison: Contract with whom?

Q. I will supplement the question by stating that the contract referred to is a contract then existing between Bruce's Juices and American Can Company which provides, in accordance with the form of it which American Can Company has produced in evidence here, for the purchase of all cans from the American Can Company.

Mr. Callahan: I object to that question as to form; it is not an intelligent question; I cannot follow it; that is number one. And number two, it is wholly irrelevant.

Mr. Fowler: If the witness states he cannot understand that question I would be glad to repeat it.

The Witness: I do not understand it.

Q. I will ask the question again. I will ask you, Mr. Nugent, if it was not agreed between you, representing the American Can Company, and Mr. J. Adam Bruce, representing Bruce's Juices, Inc., that notwithstanding the fact that there was then in existence a contract on the form used by the American Can Company, which provided that

Bruce's Juices, Inc., should purchase all of its cans during that period of time from the American Can Company, that nevertheless the American Can Company was agreeable for Bruce's Juices, Inc. to purchase from the Continental Can [fol. 156] Company cans to be used by Bruce's Juices in packing tomato juice in Vincennes, Indiana, in connection or cooperation with the Vincennes Packing Corporation, in 1940.

Mr. Callahan: Will counsel state what bearing that has on this examination or the issues involved in this suit?

Mr. Fowler: I do not care to explain my theory of the value of the question. If counsel has objection of course he can make it; if counsel feels that is too far afield he can instruct the witness not to answer it.

Mr. Callahan: The question asked is entirely incompetent, irrelevant and immaterial to the issues in this suit, and I object to it for that reason.

A. I do not remember the details at the time and would have to refer to our records to find out just how the transaction was handled.

Q. Will you refer to your records in connection with this transaction, and then I will examine you later on the point?

A. Yes, sir.

Mr. Allison: Plaintiff continues its previous objection to the series of questions on this point, for the purpose of the record.

Q. Now, Mr. Nugent, you knew, did you not, that all of the corporations heretofore enumerated as customers of the American Can Company were selling juice in competition with Bruce's Juices during the period indicated by your previous testimony?

Mr. Allison: I object to the question as repetitious; this witness has already answered that they dealt with them from time to time, but no period was specified.

[fol. 157] Mr. Fowler: O. K.; if you want to make me go back and do it, all right.

Mr. Allison: I think the question is too broad.

Q. Mr. Nugent, in what year did Engelman Gardens of Edenboro, Texas, purchase cans from the American Can

Company through its subsidiary, the American Can Company Southern?

A. Do you mean packers' cans?

Q. I mean in this instance the 2.02 cans.

(Discussion off the record.)

A. Our records indicate that the first year we sold Engelman Gardens the 2.02 diameter cans was in 1938.

Q. What other years did you sell them?

A. 1939, 1940—the name was changed—that would be the extent that we sold those cans to Engelman Gardens.

Q. Do you know from your records or personal information and information obtained in the course of your filling the position with the American Can Company, what juice or juices Engelman Gardens canned during this period of time?

A. I do not know all of them, no.

Q. Well, will you tell us what you do know?

A. In this small can?

Q. Yes.

A. I know that they had grapefruit juice, and that is the only juice that I know definitely that they marketed in this can.

Q. They specialized in grapefruit juice, did they not?

A. That was their business, packing grapefruit juice.

Q. You knew their plant was located in Edenboro, Texas, did you not?

A. Yes, sir.

[fol. 158] Q. You knew they distributed their product in the state of Texas?

A. No, I did not know that; I did not know where their markets were.

Q. You knew in the course of events they sold their tomato juice, did you not?

Mr. Callahan: You are asking for his opinion. How does he know? This witness is offered as a representative of the American Can Company, and you are asking him to give the business operations of someone not connected with the American Can Company, and proof of which can be *made* from the proper source. You are not asking for the proper evidence in any event. I again object to the examination.

Mr. Fowler: I again mention that if at any time counsel for the plaintiff feels that the questions are improper and

that we have no right to ask them they of course can instruct the witness not to answer.

Mr. Callahan: We realize that. I would suggest to counsel and to the defendant that if they want to find out where and when various customers of American Can Company distributed their product, they go to those customers and find out; the American Can Company does not have the information.

Mr. Fowler: Thank you for the suggestion, and we may avail ourselves of it at a later time.

Q. Now, will you answer the question, please?
A. I did answer it.

(Record read by the reporter.)

[fol. 159] Mr. Allison: The plaintiff objects to the question on the ground that that is the first mention of tomato juice.

Mr. Fowler: I move that the words tomato juice be stricken.

Mr. Allison: I second the motion.

Mr. Fowler: And that grapefruit juice be substituted.

Mr. Allison: I withdraw my objection then.

The Witness: Now, would you mind reading the question again?

(Question as amended read by the reporter.)

Mr. Fowler: I think perhaps it would save time and confusion both to witness and counsel if in re-asking the question it is with the understanding that all objections made to the prior question may still stand, plus any additional ones counsel may desire to make.

Q. You of course knew that they were marketing their cans of grapefruit juice?

Mr. Callahan: What do you mean by marketing, Mr. Fowler?

Mr. Fowler: By marketing I mean to sell to the trade, as is the custom of those who can juices for the market.

Mr. Callahan: To know that this witness would have to examine the records of that company, would he not?

Mr. Fowler: I do not think the witness would have to, I think the witness will say he does — know.

Mr. Callahan: How can he testify to what another concern does by way of merchandising its articles?

Mr. Fowler: If he does not know it he can say so. In view of the strenuous objections of counsel I will not insist on an answer to the question.

[fol. 160] Q. I will now ask you, Mr. Nugent—and this I am asking because I think it will refresh your memory—if you do not recall that Engelman Gardens also canned in the 2.02 cans tomato juice under the name of "Tangy-tom"?

A. Not offhand; I would have to refer to our records.

Q. At what year did the Border Packing Company buy cans from the American Can Company?

Mr. Allison: During what period?

Mr. Fowler: During the period in question. I will state for the record that all questions refer to the period of time between June 19, 1936, and December 31, 1942.

A. I mentioned previously that I was not sure whether the Border Packing Company was a customer of ours for the full period.

Q. Do you recall that they were for a number of years?

A. For at least two or three years, I know that.

Q. Do you know what juice or juices they packed in these cans?

A. I do not. I did not call on the Border Packing Company during that period, or at the period if they did pack such cans.

At this point a recess was taken until 2 P. M.

After Recess

Continuation of the examination of ALLEN HERBERT NUGENT.

By Mr. Fowler:

Q. Mr. Nugent, state whether or not all of the cans which were sold by American Can Company of the 2.02 diameter used for the purpose of containing fruit and vegetable juices as beverage was lithographed.

[fol. 161] A. You are confining it now to the 2.02 size?

Q. Yes.

A. My records here show that there were a few plain cans, not with lithographed label, sold during that period.

Q. What percent would you say were lithographed and what per cent plain, according to your information from your records?

Mr. Callahan: You want an approximation?
Mr. Fowler: That is all.

A. Just looking at it hurriedly it looks like it would not exceed one per cent.

Q. You mean 99 per cent were lithographed?

A. Yes, sir.

Q. And those lithographed cans stated the content of the can?

Mr. Allison: May we inquire whether you refer to the content as to measure or as to nature, in other words tomato juice or six ounces?

Mr. Fowler: As to the type of juice contained therein.

A. I could not say definitely because some of them had their own labels, and I really do not know, I could not answer definitely on that.

Q. Would you state in your opinion that the large majority did?

A. Yes, I would say that was true.

Q. Going back to the transaction in Vincennes, Indiana, do you know what kind of cans were used by Bruce's Juices in the operation there, as to size, was it a 2.02 can?

A. Well, we did not make the cans, nor was the Vincennes Packing Company a customer of ours, and I cannot say definitely.

[fol. 162] Q. You had some knowledge of the transaction, didn't you?

A. I understood that there was the operation going on.

Q. State whether or not you knew it was a 2.02 can operation.

A. Not after we started negotiations with Vincennes, or with whomever we had it.

Q. You did before? I do not quite get your answer.

A. I say after they started their negotiations of Bruce's Juices with Vincennes and their supplier of cans, I do not know.

Q. You state now that you do not know whether that operation was a 2.02 operation or a larger can?

A. No, sir.

Q. You have no knowledge on that point?

A. I will have to say that I cannot answer that, I do not know.

Q. Now, from your knowledge and your position as sales manager of the American Can Company and your knowledge of that department, will you state whether or not Engelman Gardens sold the juices it packed in the state of Texas?

Mr. Callahan: I object to the form of that question. Again, Mr. Fowler, may I point out that that information could only come from Engelmen Gardens. How could this witness possibly know it?

Mr. Fowler: He might know it; if he does he may say so, and if he does not he may say so.

Mr. Callahan: You can state the reason why you cannot answer it.

Mr. Fowler: And he can state the reason why if he can answer it also.

[fol. 163] Mr. Callahan: Either one.

A. We manufacture cans. From the canners' standpoint I direct those sales. Once the cans are sold and invoiced, we have a record of the orders and we have a record of the invoices. Beyond that, when they reach the customer's factory, we do not follow through to see whether those cans are going to be used for this or for that. I cannot say when we ship a carload of cans to a customer just exactly what he is going to use the cans for.

Q. I will ask you whether or not you know that Engelman Gardens sold the juice they canned in the state of Texas.

A. No.

Q. And you likewise did not know, at least in a large number of states in which Bruce's Juices sold its 2.02 cans?

Mr. Callahan: I submit that the witness has answered that question.

Mr. Fowler: If you will tell for the record what it was.

Mr. Callahan: The witness has stated that he has no knowledge concerning the use made by canners, of cans sold by American Can Company.

Q. Do you adopt that as your answer, Mr. Nugent?

Mr. Callahan: That is exactly what the witness said. If you want to have the reporter go back and read it, OK.

Mr. Fowler: He did not answer the question at all, he just made a general talk about what was done with cans. I ask him again now, giving him an opportunity to state whether or not he knew the large number of states in which Bruce's Juices did distribute its juices in 2.02 cans.

[fol. 164] Mr. Callahan: You can answer that yes or no, Mr. Nugent.

A. No.

Q. How many times did you have personal conferences with Mr. Bruce regarding his business in 1936, would you say, to the best of your knowledge?

A. 1936?

Q. Yes.

A. I do not know.

Q. Did you have any?

A. The first that I can recall where I had association with Mr. Bruce in a business way was in 1937.

Q. How many conferences did you have with Mr. Bruce regarding his business and your finishing of cans for it in 1937?

Mr. Callahan: When and where do you mean, Mr. Fowler?

Q. How many conferences did you have in your office in New York, how many conferences did you have in Bruce's Juices' office in Florida, how many conferences did you have over the long distance telephone or over the local telephone?

Mr. Callahan: When?

Mr. Fowler: In 1937.

Mr. Callahan: If you are able to answer that question, Mr. Nugent, answer it.

A. I cannot understand it.

Q. Did you have any?

A. In 1937?

Q. Yes.

A. Yes.

Q. Did you have several?

A. Well, what do you mean by several? How many?

[fol. 165] Q. We will start with each number then, if we must do it that way. Did you have two?

A. In 1937?

Q. Yes.

A. Yes, sir.

Q. Did you have three?

A. I don't know definitely how many I had.

Q. Would you say you had three?

A. I do not know whether it was three or four or how many; I know we had a few. When you speak of several, I do not know.

Q. How many do you think you had?

Mr. Callahan: I object to the form of that. It does not matter what the witness thinks, it is the facts; and he can testify only to facts.

(Question read by the reporter.)

A. I don't know.

Q. How many, if any, did you have at the plant of Bruce's Juices, in Tampa, Florida?

Mr. Allison: I object to the question unless the time is specified. 1937? Are you still talking about 1937?

Mr. Fowler: Certainly I am talking about 1937.

A. I cannot state definitely,

Q. There were some though, were there not?

A. I think there were two.

Q. And the rest of them were had when you were in New York?

A. Yes, sir.

Q. And as a matter of fact you did talk on the long distance telephone with Mr. Bruce a good many times, did you not?

[fol. 166] A. In what year?

Q. In 1937—all this is 1937.

A. Well, that would be something that I cannot answer, I do not remember.

Q. Now, in 1938, did you have any conferences with Mr. Bruce in New York when Mr. Bruce was in New York, in your offices here, or out to lunch or dinner with him, regarding his business and the sale by you, representing your company, of cans to his company, Bruce's Juices?

A. The only way that I can answer that question is that I have so many every day visitors and out to lunch with customers that I cannot go back that long, back in the year 1938, and say definitely whether I had any visits or just what our visits were, or anything else—that is too long ago.

Q. You do not make so many trips to Tampa—do you remember whether you had any conference with him in 1938 in the plant of Bruce's Juices in Tampa, Florida?

A. I do not.

Q. Did you have any conferences with him over the long distance telephone in 1938 that you recall?

A. I cannot say definitely now.

Q. You would not say you did and you would not say you did not, is that correct?

A. That is right, I do not know.

Q. Now, in 1939, did you have any conferences with Mr. Bruce at the Bruce's Juices plant in Tampa, Florida?

A. No, sir.

[fol. 167] Q. Did you have any conferences with him in New York City?

A. The only way I could answer that—possibly so, I do not remember; I know that he was in the office several times, and that is all I can say.

Q. Now you kept in pretty close touch with Mr. Bruce and his business because you were selling him a large amount of cans, were you not?

A. The same as I did with our other customers.

Q. And that was true in 1939 and 1940, 1941 and 1942, was it not?

A. Well, if you put on the year 1942 I will have to say no.

Q. All right, was it true in 1939?

A. Yes, sir.

Q. Do you recall whether you were in his place of business in Tampa in 1939 or not?

A. I was not.

Q. Were you in his place of business in Tampa in 1940?

A. No, sir.

Q. Will you state whether or not you had conferences with him regarding his business and your sale of cans to him in 1941, either in New York or in Tampa, as you recall?

A. I cannot recall.

Q. Did you have any conferences with him in 1942 in your New York offices or in New York?

A. I am quite sure I did not.

Q. You did carry on correspondence with him about his business affairs?

[fol. 168] A. No, I did not—you will have to mention the year.

Q. We will take 1938.

A. I will have to refer to the records, because I cannot remember.

Q. Can you remember whether or not you wrote him in 1939 about his business with your company?

A. I would hesitate to answer that, because I don't know without referring to the records; I can't remember.

Q. Can you remember in 1940?

A. That would be true of all those years that you have mentioned.

Q. All the years—you just do not remember whether you had any correspondence with him?

A. I remember I had some correspondence with him, but when you ask me the years I cannot remember the specific years.

Q. Now what is the gross amount of cans sold by the American Can Company in 1940?

A. To whom?

Q. To the entire trade.

Mr. Allison: To which question the plaintiff objects for the reason that it is immaterial and has no bearing on the issue of this cause; it seeks general information concerning the plaintiff's affairs which are not necessary or relevant to the issues of the cause; and the question is not confined to such products as may be sold in the field in which it competes.

Mr. Callahan: I have nothing to add to that, except the notice of the examination under which this examination is being taken specifically enumerates certain customers.

[fol. 169] Mr. Fowler: In view of counsel's objection I will not insist on an answer.

Q. What was the total amount of sales made to Engelman Gardens in 1938?

Mr. Callahan: I object to that question on the ground that it is incompetent, irrelevant and immaterial.

(Discussion off the record.)

Q. Do you know where the California Packing Corporation has its various plants that purchase cans from American Can Company?

Mr. Allison: I object to the question unless it is in reference to those plants which purchased cans competitive or of the same size with those the defendant purchased.

Mr. Callahan: I will make this statement for the record. At this point in the proceeding the plaintiff offered defendant for its examination a schedule showing the list prices and the prices as sold of all cans to all customers in continental United States for all the years involved in this suit, the same cans which were bought in one form or another, at one time or another, by the defendant in this suit.

Mr. Fowler: I have received the document to which counsel refers.

I will withdraw the question for the time being.

Q. Mr. Nugent, I find in your contract that there is a paragraph which begins as follows—the contract form referred to is the one marked Defendant's Exhibit 2, but the paragraph is contained in each of the exhibits showing your forms of contract.

Mr. Fowler: If I am wrong in that I wish some one would correct me.

[fol. 170] Q. The paragraph I refer to is the one referring to discounts. It states first:

> "In the event that buyer shall purchase of and pay seller for Sanitary cans and containers, the total net money value of which is $7,000,000 or over in any calendar year of the term of this contract, seller agrees to pay to buyer a discount of five per cent, based on the total net money value of such purchases in each calendar year of the term hereof."

In the next paragraph it states:

> "In the event that buyer shall purchase of and pay seller for Sanitary cans and containers in and amount which is between $7,000,000 and $500,000 in any calendar year of the term of this contract, seller agrees to pay to buyer a discount according to the following schedule:

| If Total Net Money Value of Such Purchases Amounts to: | Discount |
|---|---|
| $5,000,000 or over, but less than $7,000,000 | 4% on total sales |
| $3,000,000 or over, but less than $5,000,000 | 3% on total sales |
| $1,000,000 or over, but less than $3,000,000 | 2% on total sales |
| $ 500,000 or over, but less than $1,000,000 | 1% on total sales |

You recall those paragraphs in your form of contract, do you not?

A. Yes, sir.

Q. Now there were as I understand it two years when the 2 per cent discount was given Bruce's Juices on its purchases, which was given to all purchasers of the American Can Company, is that correct?

[fol. 171] A. That is not in any way hooked up with this quantity scale here which you have mentioned.

Q. That is just what I wanted to find out. That 2 per cent discount you gave your customers in addition to any discounts they might have been entitled to under this quantity sales, is that correct?

A. That is correct.

By Mr. Callahan:

Q. That was to all customers, Mr. Nugent, is that correct?

A. I was going to qualify that by saying all customers buying packers' cans. Mr. Fowler mentioned two years; there were three years.

By Mr. Fowler:

Q. Now, Mr. Nugent, in arriving at the discount a customer would get, the total purchases made by that customer were added together, and if the net cash paid exceeded for example, $1,000,000 but less than $3,000,000 that customer would receive under this paragraph 2 per cent on the total sales, is that correct?

A. $1,000,000 or over but less than $3,000,000, 2 per cent on total sales.

Q. Now, those total sales were arrived at by totaling the amount of cans purchased by a customer and taking 2 per cent of them, that is correct, is it not, if it arrived within that particular bracket?

The Witness: Would you mind reading the question, please?

(Question read by the reporter.)

[fol. 172] A. On the basis that if the buyer shall have a separate contract or contracts with the seller for the purchase of sanitary cans covering territory other than that covered by this contract and providing for the same scale

of discounts for quantity of purchases as this contract, the buyer shall be entitled to one single discount for quantity, based upon the aggregate purchase of Sanitary cans by buyer under this contract and such separate contract or contracts combined.

Q. You leave me a little confused. In other words if the customer had a contract to purchase cans in the area east of the line described by you this morning, and another contract west of that line, you would total the purchases in each territory and then give the discount to which that gross amount would entitle him under the provisions of his contract, is that right?

A. If he had a contract west of the line that we described as being the western boundary of the eastern territory, and that contract had contained the same scale of discount as the one in the eastern territory, then the purchases were combined and the quantity discount made accordingly on that volume of purchases.

Q. Now, if it did not contain the same discount they would only get a discount based upon the bracket that the total sales in the eastern territory justified under the provisions of that contract?

By Mr. Callahan:

Q. Do you understand the question?
A. I do not understand it.

Mr. Fowler: I will restate it.

[fol. 17β] Mr. Allison: May I ask the witness one question?

By Mr. Allison:

Q. Mr. Nugent, did all of the contracts have the same scale of discounts?
A. That is correct.

By Mr. Fowler:

Now, Mr. Nugent, what discounts do you give to your customers who have the contract for packers' cans and contracts for other types of cans which you sell as well, is it the same discount?

Mr. Allison: The plaintiff objects to the question because the notice and the issues in this case are confined to cans of like grade and quality to those purchased by the defendant.

Mr. Fowler: The notice is based upon an order of the court for this hearing.

Mr. Allison: That is right.

Mr. Fowler: And if reference will be had to that order it is counsel's opinion that it would embrace the question here asked.

Mr. Allison: Plaintiff further objects on the ground that the witness on the stand has been qualified only as to questions regarding packers' cans and counsel for plaintiff hereby instructs the witness to limit his answer to the foregoing question to packers' cans of like grade and quality to those purchased by the defendant during the period in question.

Mr. Fowler: I understand then that you instruct the witness not to answer this question?

Mr. Allison: No, to restrict his answer to packers' cans of like grade and quality to those sold to the defendant during the period in question.

[fol. 174] Mr. Fowler: I take that as an instruction equivalent to telling him not to answer, inasmuch as that calls for the discounts in contracts for cans which are not packers' cans. In order to perhaps clarify just a little, so that we will have definitely before the court the position of each party in reference to this question, I will ask this additional question.

Q. Mr. Nugent, in reference only to the contracts with the customers of the American Can Company who have during the period in question contracts for the purchase of packers' cans, I will ask you if those customers who purchased from you and had a contract for such purchases, cans called the general line, that is cans not embraced in the line referred to as packers' cans, and in fact all cans and containers which you sold to the same customers—whether or not those contracts provide for the same discounts as set forth in the form contract which you have already identified and which has been introduced in evidence.

Mr. Allison: Plaintiff interposes the same objection as to the previous question upon the several grounds therein stated.

And counsel for plaintiff likewise instructs the witness to restrict his answer to packers' cans of like grade and quality to those cans sold to the defendant during the period in question.

Mr. Fowler: I repeat that that instruction is equivalent to instructing the witness not to answer, because the question calls entirely for contracts that do not embrace the packers' cans. And the witness has previously testified that all of the cans purchased by Bruce's Juices were packers' cans, or practically all of them.

(Discussion off the record.)

[fol. 175] Mr. Fowler: Under advice of the witness's counsel I will ask him to answer the question in such manner as he may think proper under such advice.

Mr. Callahan: We are not advising the witness how to answer, but suggesting to counsel the course of interrogation.

Mr. Fowler: Which is noted, but the question is renewed.

A. Any purchases of so-called general line cans—I call them general line cans—made by any of the customers enumerated are not included with the purchases made by such customers of packers' cans for figuring quantity discount.

Q. Then I understand that if one of these customers in his various plants throughout the country buys both general line cans and packers' cans, that you add the packers' cans together to arrive at the total as a basis for the discount, but do not add thereto the general line cans purchased, is that correct?

A. I will have to say that, as previously stated, we do not add the purchases of general line cans by these customers to the packers' cans purchases of such customers in figuring the quantity discount.

Then you arrive at it by simply totaling the packers' can purchases, is that correct?

A. That is correct.

Q. Do you have different bookkeeping records, keeping entirely separate the packers' cans purchased and the general line cans purchased?

A. To my best knowledge we do.

[fol. 176] Q. Do you have anything to do, Mr. Nugent, with the settlement of refunds or discounts, outside of packers' cans?

A. No, sir.

Q. Do you have charge of the discounts and settlements made with the purchasers of packers' cans?

A. I direct the sales of packers' cans and am governed by the documents or policies written by the company.

Q. In the question of settlements on claims or discounts, rebates or refunds on packers' cans, do you make those, in reference to them?

A. In reference to packers' cans?

Q. Yes.

A. I do, subject to the policies as laid down by the company.

Q. Now, where does the California Packing Corporation have plants to which are delivered cans, packers' cans, purchased from the American Can Company?

A. Do you mean packing all products or just those that are competitive to Bruce's Juices?

Q. I mean packers' cans.

Mr. Callahan: I believe that question should be limited to cans in competition with the defendant's product here.

Mr. Allison: They may pack meat or something like that that would not have any particular bearing here, and still it would be a packers' can.

Mr. Fowler: And it would be figured in the discount.

[fol. 177] Mr. Allison: That is right; just as with Mr. Bruce if he chose to pack meat. I just want to be sure that Mr. Nugent gets your question. You want the names of all their branches where they ship packers' cans, regardless of what they put into them?

Mr. Fowler: That is right. That is one of the questions you wanted to know about in your motion for more details as to our pleas.

Mr. Callahan: You may answer that question.

A. I am unable to answer it, because they have so many factories that I cannot recall from memory all their plants, where they are located.

Q. Will you produce from the records of your corporation —and this is the general office of the American Can Company — a list of the cans purchased by the various canning plants of the California Packing Company that purchased packers' cans in 1937, 1938, 1939, 1940, 1941 and 1942, and showing likewise from which plant or warehouse, referred

to as distributing point, of the American Can Company these cans were delivered?

A. You are referring now only to those sizes that are competitive with the sizes purchased by Bruce's Juices?

Q. No, sir, I am referring to all cans referred to as packers' cans.

Mr. Allison: To the question or request as propounded the plaintiff objects for the reason that its scope goes beyond the present or possible future issues of this cause; it is to that extent immaterial and irrelevant.

Further, that the scope of the question seeks disclosure of confidential business matters between the plaintiff and [fol. 178] other customers which are not subject to disclosure without consent of such customers.

And the plaintiff now offers to produce for defendant a list of the canning plants of California Packing Corporation, to which during the years in question packers' cans of like grade and quality and competitive with those sold to the defendant were delivered by the plaintiff, and the plaintiff's plants from which the same were shipped.

Mr. Fowler: I cannot accept the offer of counsel for the reason that the witness has already testified that discounts to its customers, which includes the California Packing Corporation, are arrived at by totaling the total amount of packers' cans purchased, and not limited to the total amount of cans which are packed with products competitive with Bruce's Juices. I will, however, accept the offer of the counsel and ask the witness if he will also supplement the list with the cans purchased known as packers' cans by California Packing Company not included in the list which counsel for the plaintiff has offered to provide, but yet used in figuring the discounts to which California Packing Corporation is entitled under the contract.

Mr. Allison: The plaintiff necessarily refuses to comply with defendant's request and certifies the question of the propriety and relevance of the request to the Circuit Court for decision.

Mr. Fowler: To get the record clear on our positions I will once more ask Mr. Nugent this question.

Q. Which of the corporations enumerated this morning, and which are customers of the American Can Company, [fol. 179] in addition to having a contract or having had a

contract at any time during the period in question to purchase cans from the plaintiff other than packers' cans?

Mr. Allison: The plaintiff objects to the question as propounded upon the ground that the same is immaterial, irrelevant and improper for the defense raised in this cause, and instructs the witness to refuse to answer the question, and certifies the same to the Circuit Court for determination of its relevance and propriety.

Q. Mr. Nugent, you have stated that you are in charge of general sales and are general manager for American Can Company for packers' cans. Who is the general sales manager who holds the like position in reference to the general line cans sold by the American Can Company?

A. Mr. W. C. Stolk.

Q. How long has he occupied that position?

A. As I recall two years approximately.

Q. What work did he do for the company prior to that time?

A. He was district sales manager for the Atlantic Division.

Q. For approximately how long?

A. I cannot answer that; I don't know.

Q. Was he in such position in 1936?

A. I do not know. You see I am not familiar with his duties before he came into the general managers sales.

Q. You do not know how long he occupied that position?

A. No, I do not.

[fol. 180] Q. In your opinion was it several years or a few years?

A. I would not want to make the statement; I do not know.

Mr. Fowler: Am I to understand that you are or are not going to produce a list of the canning plants of the California Packing Company wherein packers' cans are used, wherein juices are canned competitive to Bruce's Juices, together with the various factories or distribution points of the American Can Company from which such cans were furnished?

Mr. Callahan: The position of the company has already been stated completely on that request.

Mr. Fowler: May I ask you when you will produce that list?

Mr. Callahan: At the earliest convenient time, subject to interference with our extremely important war work, among other things, which this examination is adding.

Mr. Fowler: Let the record show that we are all in favor of war work and seek the least possible interference with the same.

Q. In arriving at the discount to which California Packing Corporation is entitled you total the cans purchased by that company for its Tampa plant and its plants throughout the United States and take whatever discount the total entitles that corporation to under the provisions of your contract, is that correct?

Mr. Callahan: The witness has been asked that question and answered it three times to my knowledge. Is there any need of repeating all this matter?

[fol. 181] Mr. Fowler: Will you repeat the question.

Mr. Callahan: I object that the question has been asked before in three different ways, asked and answered, and it is only unduly prolonging the examination to harass the witness in this way. I object to it. He can answer the question, but I warn you Mr. Counsel, that I shall object strenuously the next time you ask that question.

Mr. Fowler: I am not telling counsel how to state his objections, and I am only mildly and academically interested in his warnings.

Q. What was the total amount of sales to California Packing Corporation of packers' cans in 1942 by the American Can Company?

A. I don't know.

Q. What officer or employee of the American Can Company has that information?

A. The auditing department.

Q. That department is under the supervision of your comptroller, is it not?

A. That is correct.

Q. What is the name of your comptroller?

A. Mr. Wardell, W. J. Wardell.

Q. Your records would show that information, would they not, here in New York?

A. Yes, sir.

Mr. Fowler: I will now ask counsel if they will produce that information at this hearing.

[fol. 182] Mr. Allison: The plaintiff declines the request for the reason that it involves purchases of packers' cans not competitive with those used by the defendant; therefore it goes beyond the issues or possible issues of this cause in the light of the applicable statutes and further seeks confidential business information which the plaintiff cannot disclose without the consent of such customers; and such information will therefore not be furnished; and the propriety of the request is certified to the Circuit Court for determination.

Q. Mr. Nugent, all of those cans in question were used in arriving at the total amount of cans purchased upon which a discount is based, is that correct?

Mr. Callahan: That is the fourth time that question has been asked.

Mr. Fowler: I do not care how many times.

Mr. Allison: I object to the question. It is repetitious and also is not limited to packers' cans.

Mr. Fowler: Do you want to certify it?

Mr. Allison: I will instruct the witness that all replies are to be limited to packers' cans. I think that is the extent of his information or his advice.

(Question read by the reporter.)

A. As I have previously stated, purchases of the California Packing Corporation of packers' cans are grouped for quantity discount purposes.

Mr. Fowler: In view of the various discussions between counsel I am uncertain whether or not this question has been answered, but the record will show.

[fol. 183] Q. Mr. Nugent, what was the amount of packers' cans purchased by the California Packing Corporation and delivered at that company's plant at Tampa, Florida, in year 1942?

Mr. Allison: To which question the plaintiff objects upon the ground that it seeks disclosure of confidential business relations with a customer other than the defendant and goes beyond the scope of this inquiry.

And the witness is instructed to refuse to answer the question, and the propriety of the question is certified to the Circuit Court for decision.

Q. Mr. Nugent, what was the amount of packers' cans purchased by the California Packing Corporation and delivered at that company's plant at Tampa, Florida, in the year 1941?

Mr. Allison: To which question the plaintiff objects upon the ground that it seeks disclosure of confidential business relations with a customer other than the defendant and goes beyond the scope of this inquiry.

And the witness is instructed to refuse to answer the question, and the propriety of the question is certified to the Circuit Court for decision.

Q. Mr. Nugent, what was the amount of packers' cans purchased by the California Packing Corporation and delivered at that company's plant at Tampa, Florida, in the year 1940?

Mr. Allison: To which question the plaintiff objects upon the ground that it seeks disclosure of confidential business relations with a customer other than the defendant and goes beyond the scope of this inquiry.

And the witness is instructed to refuse to answer the question, and the propriety of the question is certified to the Circuit Court for decision.

[fol. 184] Q. Mr. Nugent, what was the amount of packers' cans purchased by the California Packing Corporation and delivered at that company's plant at Tampa, Florida, in the year 1939?

Mr. Allison: To which question the plaintiff objects upon the ground that it seeks disclosure of confidential business relations with a customer other than the defendant and goes beyond the scope of this inquiry.

And the witness is instructed to refuse to answer the question, and the propriety of the question is certified to the Circuit Court for decision.

Q. Mr. Nugent, what was the amount of packers' cans purchased by the California Packing Corporation and delivered at that company's plant at Tampa, Florida, in the year 1938?

Mr. Allison: To which question the plaintiff objects upon the ground that it seeks disclosure of confidential

business relations with a customer other than the defendant and goes beyond the scope of this inquiry.

And the witness is instructed to refuse to answer the question, and the propriety of the question is certified to the Circuit Court for decision.

Q. Mr. Nugent, what was the amount of packers' cans purchased by the California Packing Corporation and delivered at that company's plant at Tampa, Florida, in the year 1937?

Mr. Allison: To which question the plaintiff objects upon the ground that it seeks disclosure of confidential business relations with a customer other than the defendant and goes beyond the scope of this inquiry.

And the witness is instructed to refuse to answer the question, and the propriety of the question is certified to the Circuit Court for decision.

[fol. 185] Q. Mr. Nugent, what was the amount of packers' cans purchased by the California Packing Corporation and delivered at that company's plant at Tampa, Florida, from June 19, 1936 to December 31, 1936?

Mr. Allison: to which question the plaintiff objects upon the ground that it seeks disclosure of confidential business relations with a customer other than the defendant and goes beyond the scope of this inquiry.

And the witness is instructed to refuse to answer the question, and the propriety of the question is certified to the Circuit Court for decision.

Q. Now you know as a matter of fact, Mr. Nugent, that there is a plant of the California Packing Corporation in Tampa, do you not?

A. Yes, sir.

Q. Do you know what that corporation packs, in a general way?

A. Confining it to what territory?

Q. What it packs, the Tampa plant.

Mr. Callahan: Are you asking of his own knowledge?

Mr. Fowler: Yes. That is the only knowledge that I know of that he could give.

A. I have not been through the factory and I could not answer definitely what they do pack.

Q. If I suggest to you that it is citrus, would that refresh your memory to any extent on that?

A. I would say that that was one product that they packed.

[fol. 186] Q. Can you tell from your information in your department regarding what bookkeeping system is used by the American Can Company?

Mr. Callahan: That is a very broad question.

Mr. Fowler: If he does not want to know anything about it I want to know.

A. I have not had any experience in that end of it.

Q. Do you know how the charges are actually made on the books, by what method?

Mr. Allison: Charges for what?

Mr. Fowler: Charges for cans sold to customers.

A. I do not know, because I have not had any experience in that department.

Q. Do you know how credits go through and are credited on the books by the bookkeeper?

A. What kind of credits?

Q. Any credits either for cash, for discounts or adjustments or credits of any nature.

A. I do not know how they go through the book, no.

Q. Excepting cash payment, who instructs the bookkeepers or your auditing department or accounting department to give credits on the books?

A. That is a very broad question. I would like to have the question read, please.

(Question read by the reporter.)

The Witness: In our department it is only from the standpoint of claims.

Q. Can you answer the question?

Mr. Callahan: He has answered it.

[fol. 187] Mr. Fowler: That is a question of opinion.

Q. Don't you know who is authorized and who does give the discounts to a customer, or are the discounts given by one man to different customers, or dealt with by different men in the organization?

A. The discount checks are prepared by the auditing department.

Q. In case there are any adjustments made on accounts who has charge and does give those adjustments, permits those adjustments—authorizes those adjustments?

A. As far as claims are concerned we do.

Q. That is the sales department?

A. The sales department.

Q. Now what claims are included in your department?

A. Claims for defective cans.

Q. When are claims for defective cans generally in practice allowed?

A. Whenever they are computed by the men who are handling that work.

Q. What department or what individual is in charge of allowing these general two per cent discounts, for example?

A. The executives of the company.

Q. You do not know which one handles that?

A. No one handles it, it is agreed upon by the executives of the company.

Q. Now you know that Stokely Brothers & Company, Inc., have a plant in Tampa, Florida, do you not?

A. Yes, sir.

[fol. 188] Q. You know that they can vegetables and citrus and the juices of vegetables and citrus there, do you not?

A. I know that they can citrus juices, that is all I can speak about, because I have not been in their plant but once.

Q. Do you know in what territory or territories the California Packing Corporation distributes the citrus and vegetable juices that it packs?

A. No.

Q. You do not?

A. I do not.

Q. Do you know any State in which they distribute such juices?

A. I am not aware of where they sell their merchandise.

Q. You have no knowledge and you cannot state any State where they sell any citrus or vegetable juices?

A. I cannot.

Q. Do you know in what State or States Stokely Brothers & Company, Inc., sell and distribute vegetable and fruit juices?

A. As I have said before I do not know where they sell their products. I am in a position of being sales manager for American Can Company in selling cans; I do not know where these various customers merchandise their products.

By Mr. Callahan:

Q. By cans, Mr. Nugent, you mean empty cans?
A. Empty packers' cans.

Mr. Fowler: I will observe that after the witness has answered the question, counsel, Mr. Callahan, stated to him in substance that he referred to empty cans, where- [fol. 189] upon the witness gave his assent. Now we will go back.

Mr. Callahan: I will accept that observation and state that it was in the interest of clarifying the record, and also for the use of the Judge in understanding about the can manufacturing industry.

By Mr. Fowler:

Q. I will ask you whether or not you know as a matter of fact, as general sales manager or manager of sales of the American Can Company, that the California Packing Corporation does pack citrus and vegetable juices in its various plants throughout the United States.

A. As general sales manager of packers' cans for the American Can Company I do not.

Q. You do not know for what purpose they use the cans which American Can Company sells them?

A. Only in a general way.

Q. Well, to what extent do you know they use the cans?

A. Well, I know they use them for various products; I cannot say in what factory they pack the various products, it would be just generalizing if I tried to make a statement.

Q. What are some of the products that you say you do know they pack in cans?

A. I know that they pack peas and corn and tomatoes and string beans and asparagus.

Q. But you do not know that they pack any fruit or vegetable juices?

A. I know that they pack citrus juice at Tampa.

Q. Now I will ask you again, you do not know of them packing any tomato juice anywhere?

[fol. 190] A. They buy cans and on their orders they specify them for tomato juice. I have not seen them pack tomato juice and I cannot state definitely that they do. The cans are sold f. o. b. our factory, and that is as far as we go in following them up.

Q. The orders do state, though, for what purpose they are to be used, do they not?

A. The customers' orders?

Q. Yes.

A. No, sir.

Q. Didn't you state just a moment ago that you knew from their orders that they did purchase cans to pack tomato juice?

Mr. Callahan: I recall no such statement by the witness, and it is an attempt to put something in the mouth of the witness that he did not say.

Mr. Fowler: So says counsel.

Mr. Callahan: And sticks by it.

Mr. Fowler: Read the question to the witness, unless you want to instruct him not to answer.

(Question read by the reporter.)

Mr. Callahan: If you want to refer to a portion of the previous record, Mr. Fowler, I have no objection. I say that your question in form is objectionable.

Mr. Fowler: Let him answer the question whether he did or did not say that.

(Question again read by the reporter.)

The Witness: If I made that statement it was incorrect, because their orders do not specify as to the products to be packed in them.

[fol. 191] Q. Did you have approximately the same contact with the other customers listed as you did with Bruce's Juices?

Mr. Callahan: What companies?

Mr. Fowler: I will read the list then.

Q. Upon the request of counsel I read the list that has been heretofore stated on several occasions:

Engelman Gardens, Edenboro, Texas, Border Packing Company, Brownsville, Texas, California Packing Corporation, Stokely Brothers & Company, Inc., Hawaiian Pineapple Company, Ltd., Libby, McNeill & Libby, Inc., Morgan Packing Company, The Great Atlantic & Pacific Tea Company and Tacrmino Corporation.

A. I have visited with those customers at times but those visits were not as frequent as with Mr. Bruce.

Q. Then you do not know whether or not California Packing Corporation packed tomato juice?

A. I cannot say definitely.

Q. Well, do you know in what State or States California Packing Corporation distributed citrus juice in cans?

A. I do not.

Q. Do you know any State in which it distributed citrus juice in cans?

A. No, I do not, because I do not know how their sales were handled.

Q. Now in how many plants of the California Packing Corporation have you been?

A. In this period now?

Q. Surely, that is all the way through.

A. One.

Q. Just one?

A. I should say in the office of the company, not in the plant.

[fol. 192] By Mr. Callahan:

Q. Your answer then is not in any one of the plants?

A. Not in any one of the plants.

By Mr. Fowler:

Q. Where was the office?

A. At Tampa, Florida.

Q. Is not the office in the plant there?

A. Well, I was not out in the plant; the office may be connected with the plant, but not in the plant itself.

Q. Now a while ago I asked you in what place or places California Packing Corporation had plants that purchased cans, to which cans were delivered by the American Can Company, and from which plants or distributing points the American Can Company delivered them. As I recall it

counsel advised you not to answer that question and certified the question to the Circuit Judge. I now ask you to state where the California Packing Corporation has plants which purchased packers' cans from you, without asking you from which of your plants the same are distributed.

Mr. Allison: Plaintiff renews its objection to the rephrased question upon the several grounds enumerated to the prior question, and now directs the witness to decline to answer the question except as restricted to packers' cans of like grade and quality and competitive with those sold to the defendant during the period in question; and certifies the question to the Circuit Court for determination. Do you want him to answer as restricted?

Mr. Fowler: You said you certified it. In view of counsel's statement certifying the question to the Circuit Judge, I now ask him to answer the question as restricted.

[fol. 193] Mr. Allison: Please read the question.

(Record read by the reporter.)

The Witness: My memory does not permit of answering this question at this time.

Mr. Fowler: Will you produce records from your office here in New York giving that information?

Mr. Allison: We will.

Mr. Callahan: The company will undertake to produce such records.

Q. Has your department charge of all the records from the time a claim is made by a customer to its final settlement?

A. Not our department, not the sales department.

Q. In what form do these settlements go from your department to the bookkeeping department?

Mr. Allison: I object to the question unless it is more particularly defined what settlements are referred to.

Mr. Fowler: A while ago the witness answered that his department had charge of claims of defective cans, which I take it includes damaged cans——

The Witness: Those cans as referred to in the guarantee clause of our regular contract.

Q. I now ask you in what form any adjustment made for damaged or defective cans goes to the bookkeeping department?

A. I have supervision over the men that we call—those men who are in charge of the adjustment departments of the company; when a complaint is presented by a customer it goes to those respective officers, the respective officers of the adjustment departments, and after the negotiations [fol. 194] have reached a point—I should not say negotiations—after they have determined from the evidence obtained they bring that file to my office—we have an adjustment man here in New York who brings that evidence to my office, and I go over it, and if there is enough evidence to indicate that the claim should be approved then I approve it for payment.

Q. And what form does this allowance take as it goes to the bookkeeping department?

A. What form?

Q. Do you then telephone the bookkeeping department, do you send them a memorandum or do you send them a letter?

A. I O. K. the claim for the man who is the head of the adjustment department here in New York and he handles it with the bookkeeping department or the auditing department.

Q. In other words, he sees that the settlement that is made is reflected on the books of the corporation?

A. Yes, sir, that is right.

Q. Do you know what form he uses in indicating that allowance?

A. I do not.

Q. That likewise would be under the control of your bookkeeping department?

A. Yes, sir.

Q. Do you settle any other type of claims except just for damaged or defective cans?

A. That is the only kind of claims I approve.

Q. Do you have charge of making any other discounts or allowances?

A. No, not myself.

[fol. 195] Q. Not yourself—what do you mean by that?

A. I mean not the general sales department.

Q. What department does that?

A. When you say discounts and allowances, I would like for you to define that a little more clearly so that it can be understood by a layman like myself.

Q. Take quantity discounts, who has charge of making those?

A. The auditing department, taking the discounts from the terms of the contract.

Q. If any other allowance of discounts or allowances are due, according to your policy does that department likewise make them?

Mr. Callahan: I wish you would clarify that.

Mr. Fowler: I believe I will take a couple of minutes recess here.

(Short recess.)

Q. Mr. Nugent, I will ask you to state the policy of the corporation, the American Can Company, during the period in question regarding freight charged a customer in reference to the location of one of your plants or a distributing point.

Mr. Fowler: Now I will state for counsel's benefit if that is not perfectly clear to you I will try to go more into detail.

The Witness: Will you read the question?

(Question read by the reporter.)

A. Our general policy was to equalize freight on shipments of packers' cans with competitive points.

[fol. 196] Q. Was it not also to equalize freight with points where you have or have had a factory or a warehouse from which you made general distribution in a particular territory?

A. Only on certain sizes of cans, and depending upon the competitive conditions.

Q. Then in some instances you would equalize freight on a certain type of can to a given point and in other instances, where the can was of different size, you would not do so?

A. That is correct.

Q. Will you state why you would allow freight on certain cans and would not allow the freight on other cans to a given point?

Mr. Callahan: Would you have any objection if he gives a hypothetical illustration?

Mr. Fowler: No, not at all.

A. Our contract reads that the cans are sold f.o.b. our factory, freight equalized with a certain point. If there are

any of the sizes which are not made at that particular point then those sizes will be f. o. b. point of shipment.

Q. Now you make exceptions to that general policy, do you not?

A. If there is a competitor located nearby and we know that that competitor is making that can, and if we know certain other things that we are able to determine, whether or not his prices are the same, why then we would in some cases equalize the freight on cans that are not made at that factory.

Q. In other words, in some instances you do equalize the freight on cans not made in the factory at that point but shipped from another point, and in other cases you do not, is that correct?

[fol. 197] A. There would be some instances like that, yes.

Q. Now in making cans of approximately or nearly the same sizes what change, if any, must be made in one of your lines to change the size one or two sixteenths of an inch?

A. Well, there is a big change if you change the height of the can from one height to another.

Q. You have, do you not, in the manufacture of cans what you call lines?

A. Manufacturing lines.

Q. Upon which you manufacture a different size can on each line, is that correct?

A. No, that is not correct.

Q. Well, you do not manufacture every can on the same manufacturing line, do you?

A. We have what are known as certain types of body makers which will take diameters up to a certain diameter, from a small one up to a large one. Now those lines can be changed to make those various diameters and heights. Now then in changing from one height can, where we are changing to a height can that we have not made before, it involves the outlay of quite a little money for height change parts. If we have the diameter change parts, then the outlay of money to make the different heights applies only to the height of the can, you see.

Q. Now just what would have to be done if a can line has been making the can—say the 2.02 in diameter by 3.09 in height, and you wished to change that line to make cans 2.02 in diameter by 3.12 in height?

A. If we had not made the 3.12 height can before?

[fol. 198] Q. If you had not made it on that line.

A. Well, if it was a new height of a can we could make it on one of these lines that I mentioned that has a range for sizes—we could make that can if we had on the same line—if we had the diameter parts, but we would have to spend some money to change parts for the height of the can.

Q. Now just what change would it take to make a change from a 3.09 to a 3.12, which is a change of 3/16ths of an inch in height only?

A. I don't know.

Q. You do not have that knowledge?

A. No, that is a manufacturing matter.

Q. You just do not know how much of a job it would be?

A. No, sir.

Q. Mr. Nugent, will you refer to the records of the American Can Company and state the total amount in dollars of purchases of cans from the American Can Company, both gross and net, by Stokely Brothers & Company, Inc., for the following years: from June 19, 1936, through the rest of that year, 1937, 1938, 1939, 1940, 1941 and 1942, of packers' cans?

Mr. Allison: To which question the plaintiff objects upon the following grounds:

First, the question is immaterial, irrelevant and improper in the light of the issues and possible issues of this cause.

Second, the question goes far beyond the scope of the notice in this cause and beyond the issues.

Third, the question seeks information which is not applicable by virtue of the defense relied upon by the defendant.

[fol. 199] Fourth, the question seeks confidential information of business relations between plaintiff and a customer other than the defendant and seeks the disclosure of confidential information for the benefit of a competitor of the named customer.

Fifth, the question seeks information far beyond the sales by the plaintiff of packers' cans of like grade and quality and competitive sizes with those purchased by the defend-

ant during the period in question, and therefore the information sought to be elicited does not come within the purview of any statutes relied upon in defense.

At this point the plaintiff offers to furnish proper evidence into the record of the price at which it sold cans of like grade and quality and of competitive sizes with those sold to the defendant during the period in question, but the plaintiff instructs the witness beyond such information to refuse to answer the question, and certifies it to the Circuit Court for determination of its propriety and admissibility.

Mr. Fowler: The defendant will of course accept the offer of the information as stated by counsel, but insists upon the entire information requested and will present its position to the court and ask ruling thereon.

Mr. Allison: The plaintiff further now offers proper testimony or evidence to the defendant, if desired, showing the basis and methods employed in arriving at the scale of quantity discounts heretofore testified about and contained within the several forms of contract used by the plaintiff covering the sales of packers' cans.

[fol. 200] Mr. Fowler: I will ask that the witness state the discounts that were allowed Stokely Brothers & Company, Inc., applying the methods which counsel stated he would furnish.

Mr. Allison: The plaintiff, understanding that question to ask the percentage bracket within which such discount fell, will make no objection to the witness replying, but the plaintiff does object to an amount in dollars and cents which might have resulted from the application of such discount percentage, and instructs the witness not to answer.

I will certify that question also to the court for the reasons enumerated in the last previous certification.

Q. What quantity discount did Stokely Brothers & Company, Inc., receive on the packers' cans it purchased from American Can Company from June 19, 1936, to the end of the year, and if counsel does not object I will add for 1937, 1938, 1939, 1940, 1941 and 1942, so that counsel may make one objection instead of causing a number of questions to the same point.

Mr. Allison: You are asking now for the percentage?

Mr. Fowler: That is right, for each period of time.

Mr. Allison: To which question the plaintiff objects upon the several separate grounds enumerated in the objection

to the preceding question, and upon the additional ground that the plaintiff will be required necessarily to disclose confidential business information with such customer for the benefit of the defendant without the consent of the said named customer. And at this point the plaintiff again offers to furnish defendant the information regarding the method employed in arriving at the scale of quantity discounts as heretofore set forth.

[fol. 201] Mr. Fowler: Do you instruct him not to answer?

Mr. Allison: And at this point likewise the plaintiff requests that the folder heretofore tendered to defendant, and each of the pages therein contained, be marked for identification for the purpose of the record.

And the plaintiff directs the witness to decline to answer the question as propounded, and certifies the same to the Circuit Court for determination of its admissibility and propriety.

Mr. Fowler: To clarify this point, do you object, Mr. Allison, because of the fact that this calls for him giving discounts for different years, is that included in your objection?

Mr. Allison: The plaintiff for the purpose of expediting the hearing does not object to the multiple jointed question involving several years, as it might be covered seriatim.

Folder containing nine sheets containing the legend: "Bruce's Juices, Inc. Price History of American Can Company, American Can Company of Louisiana and the American Can Company Southern, listing sizes of cans used by Bruce's Juices at various times, from June 19, 1936 to December 31, 1942, with selling prices that would apply in all areas. Listed also are the contracts covering other concerns listed in Bruce's suit, with notations indicating sales areas covered by the various contracts," was marked Plaintiff's Exhibit No. 1 for identification April 1, 1943 C. B. (Which exhibit will be certified and presented to the Court under proper procedure.)

[fol. 202] Q. Mr. Nugent, will you refer to the records of the American Can Company and state the total amount in dollars of purchases of cans from the American Can Company, both gross and net, by Border Packing Company of Brownsville, Texas for the following years: from June

19, 1936, through the rest of that year, 1937, 1938, 1939, 1940, 1941 and 1942, of packers' cans?

Mr. Allison: To which question the plaintiff objects upon the following grounds:

First the question is immaterial, irrelevant and improper in the light of the issues and possible issues of this cause.

Second, the question goes far beyond the scope of the notice in this cause and beyond the issues.

Third, the question seeks information which is not applicable by virtue of the defense relied upon by the defendant.

Fourth, the question seeks confidential information of business relations between plaintiff and a customer other than the defendant and seeks the disclosure of confidential information for the benefit of a competitor of the named customer.

Fifth, the question seeks information far beyond the sales by the plaintiff of packers' cans of like grade and quality and competitive sizes with those purchased by the defendant during the period in question, and therefore the information sought to be elicited does not come within the purview of any statutes relied upon in defense.

At this point the plaintiff offers to furnish proper evidence into the record of the price at which it sold cans of like grade and quality and of competitive sizes with those sold to the defendant during the period in question, but the [fol. 203] plaintiff instructs the witness beyond such information to refuse to answer the question, and certifies it to the Circuit Court for determination of its propriety and admissibility.

Mr. Fowler: The defendant will of course accept the offer of the information as stated by counsel, but insists upon the entire information requested and will present its position to the court and ask ruling thereon.

Mr. Allison: The plaintiff further now offers proper testimony or evidence to the defendant, if desired, showing the basis and methods employed in arriving at the scale of quantity discounts heretofore testified about and contained within the several forms of contract used by the plaintiff covering the sales of packers' cans.

Mr. Fowler: I will ask that the witness state the discounts that were allowed Border Packing Company of Browns-

ville, Texas, applying the methods which counsel stated he would furnish.

Mr. Allison: The plaintiff, understanding that question to ask the percentage bracket within which such discount fell, will make no objection to the witness replying, but the plaintiff does object to an amount in dollars and cents which might have resulted from the application of such discount percentage, and instructs the witness not to answer.

I will certify that question also to the court for the reasons enumerated in the last previous certification.

Q. What quantity discount did Border Packing Company of Brownsville, Texas, receive on the packers' cans it purchased from American Can Company from June 19, 1936, to the end of the year, and if counsel does not object I will [fol. 203] add for 1937, 1938, 1939, 1940, 1941 and 1942, so that counsel may make one objection instead of causing a number of questions to the same point.

Mr. Allison: You are asking now for the percentage?

Mr. Fowler: That is right, for each period of time.

Mr. Allison: To which question the plaintiff objects upon the several separate grounds enumerated in the objection to the preceding question, and upon the additional ground that the plaintiff will be required necessarily to disclose confidential business information with such customer for the benefit of the defendant without the consent of the said named customer. And at this point the plaintiff again offers to furnish defendant the information regarding the method employed in arriving at the scale of quantity discounts as heretofore set forth.

Mr. Fowler: Do you instruct him not to answer?

Mr. Allison: The plaintiff directs the witness to decline to answer the question as propounded, and certifies the same to the Circuit Court for determination of its admissibility and propriety.

Mr. Fowler: To clarify this point, do you object, Mr. Allison, because of the fact that this calls for him giving discounts for different years, is that included in your objection?

Mr. Allison: The plaintiff for the purpose of expediting the hearing does not object to the multiple jointed question involving several years, as it might be covered seriatim.

Q. Mr. Nugent, will you refer to the records of the American Can Company and state the total amount in dollars of purchases of cans from the American Can Company, both gross and net, by California Packing Corporation, for the [fol. 205] following years: from June 19, 1936, through the rest of that year, 1937, 1938, 1939, 1940, 1941 and 1942, of packers' cans?

Mr. Allison: To which question the plaintiff objects upon the following grounds:

First, the question is immaterial, irrelevant and improper in the light of the issues and possible issues of this cause.

Second, the question goes far beyond the scope of the notice in this cause and beyond the issues.

Third, the question seeks information which is not applicable by virtue of the defense relied upon by the defendant.

Fourth, the question seeks confidential information of business relations between plaintiff and a customer other than the defendant and seeks the disclosure of confidential information for the benefit of a competitor of the named customer.

Fifth, the question seeks information far beyond the sales by the plaintiff of packers' cans of like grade and quality and competitive sizes with those purchased by the defendant during the period in question, and therefore the information sought to be elicited does not come within the purview of any statutes relied upon in defense.

At this point the plaintiff offers to furnish proper evidence into the record of the price at which it sold cans of like grade and quality and of competitive sizes with those sold to the defendant during the period in question, but the plaintiff instructs the witness beyond such information to refuse to answer the question, and certifies it to the Circuit Court for determination of its propriety and admissibility.

Mr. Fowler: The defendant will of course accept the offer of the information as stated by counsel, but insists [fol. 206] upon the entire information requested and will present its position to the court and ask ruling thereon.

Mr. Allison: The plaintiff further now offers proper testimony or evidence to the defendant, if desired, showing the basis and methods employed in arriving at the scale

of quantity discounts theretofore testified about and contained within the several forms of contract used by the plaintiff covering the sales of packers' cans.

Mr. Fowler: I will ask that the witness state the discounts that were allowed California Packing Corporation, applying the methods which counsel stated he would furnish.

Mr. Allison: The plaintiff, understanding that question to ask the percentage bracket within which such discount fell, will make no objection to the witness replying, but the plaintiff does object to an amount in dollars and cents which might have resulted from the application of such discount percentage, and instructs the witness not to answer.

I will certify that question also to the court for the reasons enumerated in the last previous certification.

Q. What quantity discount did California Packing Corporation receive on the packers' cans it purchased from American Can Company from June 19, 1936, to the end of the year, and if counsel does not object I will add for 1937, 1938, 1939, 1940, 1941 and 1942, so that counsel may make one objection instead of causing a number of questions to the same point.

Mr. Allison: You are asking now for the percentage?

Mr. Fowler: That is right, for each period of time.

Mr. Allison: To which question the plaintiff objects upon the several separate grounds enumerated in the ob- [fol. 207] jection to the preceding question, and upon the additional ground that the plaintiff will be required necessarily to disclose confidential business information with such customer for the benefit of the defendant without the consent of the said named customer. And at this point the plaintiff again offers to furnish defendant the information regarding the method employed in arriving at the scale of quantity discounts as heretofore set forth.

Mr. Fowler: Do you instruct him not to answer?

Mr. Allison: The plaintiff directs the witness to decline to answer the question as propounded, and certifies the same to the Circuit Court for determination of its admissibility and propriety.

Mr. Fowler: To clarify this point, do you object, Mr. Allison, because of the fact that this calls for him giving discounts for different years, is that included in your objection?

Mr. Allison: The plaintiff for the purpose of expediting the hearing does not object to the multiple jointed question involving several years, as it might be covered seriatim.

Q. Mr. Nugent, will you refer to the records of the American Can Company and state the total amount in dollars of purchases of cans from the American Can Company, both gross and net, by Hawaiian Pineapple Company, Ltd., for the following years: from June 19, 1936, through the rest of that year, 1937, 1938, 1939, 1940, 1941 and 1942, of packers' cans?

Mr. Allison: To which question the plaintiff objects upon the following grounds:

First, the question is immaterial, irrelevant and improper in the light of the issues and possible issues of this cause. [fol. 268] Second, the question goes far beyond the scope of the notice in this cause and beyond the issues.

Third, the question seeks information which is not applicable by virtue of the defense relied upon by the defendant.

Fourth, the question seeks confidential information of business relations between plaintiff and a customer other than the defendant and seeks the disclosure of confidential information for the benefit of a competitor of the named customer.

Fifth, the question seeks information far beyond the sales by the plaintiff of packers' cans of like grade and quality and competitive sizes with those purchased by the defendant during the period in question, and therefore the information sought to be elicited does not come within the purview of any statutes relied upon in defense.

At this point the plaintiff offers to furnish proper evidence into the record of the price at which it sold cans of like grade and quality and of competitive sizes with those sold to the defendant during the period in question, but the plaintiff instructs the witness beyond such information to refuse to answer the question, and certifies it to the Circuit Court for determination of its propriety and admissibility.

Mr. Fowler: The defendant will of course accept the offer of the information as stated by counsel, but insists upon the entire information requested and will present its position to the court and ask ruling thereon.

Mr. Allison: The plaintiff further now offers proper testimony or evidence to the defendant, if desired, showing the basis and methods employed in arriving at the scale of quantity discounts heretofore testified about and contained [fol. 209] within the several forms of contract used by the plaintiff covering the sales of packers' cans.

Mr. Fowler: I will ask that the witness state the discounts that were allowed Hawaiian Pineapple Company, Ltd., applying the methods which counsel stated he would furnish.

Mr. Allison: The plaintiff, understanding that question to ask the percentage bracket within which such discount fell, will make no objection to the witness replying but the plaintiff does object to an amount in dollars and cents which might have resulted from the application of such discount percentage, and instructs the witness not to answer.

I will certify that question also to the court for the reasons enumerated in the last previous certification.

Q. What quantity discount did Hawaiian Pineapple Company, Ltd., receive on the packers' cans it purchased from American Can Company from June 19, 1936, to the end of the year, and if counsel does not object I will add for 1937, 1938, 1939, 1940, 1941 and 1942, so that counsel may make one objection instead of causing a number of questions to the same point.

Mr. Allison: You are asking now for the percentage?

Mr. Fowler: That is right, for each period of time.

Mr. Allison: To which question *to* plaintiff objects upon the several separate grounds enumerated in the objection to the preceding question, and upon the additional ground that the plaintiff will be required necessarily to disclose confidential business information with such customer for the benefit of the defendant without the consent of the said named customer. And at this point the plaintiff again offers to furnish defendant the information regarding the [fol. 210] method employed in arriving at the scale of quantity discounts as heretofore set forth.

Mr. Fowler: Do you instruct him not to answer?

Mr. Allison: The plaintiff directs the witness to decline to answer the question as propounded, and certifies the same to the Circuit Court for determination of its admissibility and propriety.

Mr. Fowler: To clarify this point, do you object, Mr. Allison, because of the fact that this calls for him giving discounts for different years, is that included in your objection?

Mr. Allison: The plaintiff for the purpose of expediting the hearing does not object to the multiple jointed question involving several years, as it might be covered seriatim.

Q. Mr. Nugent, will you refer to the records of the American Can Company and state the total amount in dollars of purchases of cans from the American Can Company, both gross and net, by Libby, McNeill & Libby, Inc., for the following years: from June 19, 1936, through the rest of that year, 1937, 1938, 1939, 1940, 1941 and 1942, of packers' cans?

Mr. Allison: To which question the plaintiff objects upon the following grounds:

First, the question is immaterial, irrelevant and improper in the light of the issues and possible issues of this cause.

Second, the question goes far beyond the scope of the notice in this cause and beyond the issues.

Third, the question seeks information which is not applicable by virtue of the defense relied upon by the defendant.

Fourth, the question seeks confidential information of business relations between plaintiff and a customer other than the defendant and seeks the disclosure of confidential [fol. 211] information for the benefit of a competitor of the named customer.

Fifth, the question seeks information far beyond the sales by the plaintiff of packers' cans of like grade and quality and competitive sizes with those purchased by the defendant during the period in question, and therefore the information sought to be elicited does not come within the purview of any statutes relied upon in defense.

At this point the plaintiff offers to furnish proper evidence into the record of the price at which it sold cans of like grade and quality and of competitive sizes with those sold to the defendant during the period in question, but the plaintiff instructs the witness beyond such information to refuse to answer the question, and certifies it to the Circuit Court for determination of its propriety and admissibility.

Mr. Fowler: The defendant will of course accept the offer of the information as stated by counsel, but insists upon the entire information requested and will present its position to the court and ask ruling thereon.

Mr. Allison: The plaintiff further now offers proper testimony or evidence to the defendant, if desired, showing the basis and methods employed in arriving at the scale of quantity discounts heretofore testified about and contained within the several forms of contract used by the plaintiff covering the sales of packers' cans.

Mr. Fowler: I will ask that the witness state the discounts that were allowed Libby, McNeill & Libby, Inc., applying the methods which counsel stated he would furnish.

Mr. Allison: The plaintiff, understanding that question to ask the percentage bracket within which such discount fell, will make no objection to the witness replying, but [fol. 212] the plaintiff does object to an amount in dollars and cents which might have resulted from the application of such discount percentage, and instructs the witness not to answer.

I will certify that question also to the court for the reasons enumerated in the last previous certification.

Q. What quantity discount did Libby, McNeill & Libby, Inc., receive on the packers' cans it purchased from American Can Company from June 19, 1936, to the end of the year, and if counsel does not object I will add for 1937, 1938, 1939, 1940, 1941 and 1942, so that counsel may make one objection instead of causing a number of questions to the same point.

Mr. Allison: You are asking now for the percentage?

Mr. Fowler: That is right, for each period of time.

Mr. Allison: To which question the plaintiff objects upon the several separate grounds enumerated in the objection to the preceding question, and upon the additional ground that the plaintiff will be required necessarily to disclose confidential business information with such customer for the benefit of the defendant without the consent of the said named customer. And at this point the plaintiff again offers to furnish defendant the information regarding the method employed in arriving at the scale of quantity discounts as heretofore set forth.

Mr. Fowler: Do you instruct him not to answer?

Mr. Allison: The plaintiff directs the witness to decline to answer the question as propounded, and certifies the same to the Circuit Court for determination of its admissibility and propriety.

Mr. Fowler: To clarify this point, do you object, Mr. Allison, because of the fact that this calls for him giving [fol. 213] discounts for different years, is that included in your objection?

Mr. Allison: The plaintiff for the purpose of expediting the hearing does not object to the multiple jointed question involving several years, as it might be covered seriatim.

Q. Mr. Nugent, will you refer to the records of the American Can Company and state the total amount in dollars of purchases of cans from the American Can Company, both gross and net, by Morgan Packing Company, for the following years: from June 19, 1936, through the rest of that year, 1937, 1938, 1939, 1940, 1941 and 1942, of packers' cans?

Mr. Allison: To which question the plaintiff objects upon the following grounds:

First the question is immaterial, irrelevant and improper in the light of the issues and possible issues of this cause.

Second, the question goes far beyond the scope of the notice in this cause and beyond the issues.

Third, the question seeks information which is not applicable by virtue of the defense relied upon by the defendant.

Fourth, the question seeks confidential information of business relations between plaintiff and a customer other than the defendant and seeks the disclosure of confidential information for the benefit of a competitor of the named customer.

Fifth, the question seeks information far beyond the sales by the plaintiff of packers' cans of like grade and quality and competitive sizes with those purchased by the defendant during the period in question, and therefore the information sought to be elicited does not come within the purview of any statutes relied upon in defense.

At this point the plaintiff offers to furnish proper evidence into the record of the price at which it sold cans [fol. 214] of like grade and quality and of competitive sizes with those sold to the defendant during the period in question, but the plaintiff instructs the witness beyond such

information to refuse to answer the question, and certifies it to the Circuit Court for determination of its propriety and admissibility.

Mr. Fowler: The defendant will of course accept the offer of the information as stated by counsel, but insists upon the entire information requested and will present its position to the court and ask ruling thereon.

Mr. Allison: The plaintiff further now offers proper testimony or evidence to the defendant, if desired, showing the basis and methods employed in arriving at the scale of quantity discounts heretofore testified about and contained within the several forms of contract used by the plaintiff covering the sales of packers' cans.

Mr. Fowler: I will ask that the witness state the discounts that were allowed Morgan Packing Company, applying the methods which counsel stated he would furnish.

Mr. Allison: The plaintiff, understanding that question to ask the percentage bracket within which such discount fell, will make no objection to the witness replying, but the plaintiff does object to an amount in dollars and cents which might have resulted from the application of such discount percentage, and instructs the witness not to answer.

I will certify that question also to the court for the reasons enumerated in the last previous certification.

Q. What quantity discount did Morgan Packing Company, receive on the packers' cans it purchased from American Can Company from June 19, 1936 to the end of the [fol. 215] year, and if counsel does not object I will add for 1937, 1938, 1939, 1940, 1941 and 1942, so that counsel may make one objection instead of causing a number of questions to the same point.

Mr. Allison: You are asking now for the percentage?

Mr. Fowler: That is right, for each period of time.

Mr. Allison: To which question the plaintiff objects upon the several separate grounds enumerated in the objection to the preceding question, and upon the additional ground that the plaintiff will be required necessarily to disclose confidential business information with such customer for the benefit of the defendant without the consent of the said named customer. And at this point the plaintiff again offers to furnish defendant the information regarding the method

employed in arriving at the scale of quantity discounts as heretofore set forth.

Mr. Fowler: Do you instruct him not to answer?

Mr. Allison: The plaintiff directs the witness to decline to answer the question as propounded, and certifies the same to the Circuit Court for determination of its admissibility and propriety.

Mr. Fowler: To clarify this point, do you object, Mr. Allison, because of the fact that this calls for him giving discounts for different years, is that included in your objection?

Mr. Allison: The plaintiff for the purpose of expediting the hearing does not object to the multiple jointed question involving several years, as it might be covered seriatim.

Q. Mr. Nugent, will you refer to the records of the American Can Company and state the total amount in dollars of purchases of cans from the American Can Company, both gross and net, by the Great Atlantic & Pacific Tea Company for the following years: from June 19, 1936, through the rest of that year, 1937, 1938, 1939, 1940, 1941 and 1942, of packers' cans?

[fol. 216] Mr. Allison: To which question the plaintiff objects upon the following grounds:

First, the question is immaterial, irrelevant and improper in the light of the issues and possible issues of this cause.

Second, the question goes far beyond the scope of the notice in this cause and beyond the issues.

Third, the question seeks information which is not applicable by virtue of the defense relied upon by the defendant.

Fourth, the question seeks confidential information of business relations between plaintiff and a customer other than the defendant and seeks the disclosure of confidential information for the benefit of a competitor of the named customer.

Fifth, the question seeks information far beyond the sales by the plaintiff of packers' cans of like grade and quality and competitive sizes with those purchased by the defendant during the period in question, and therefore the information sought to be elicited does not come within the purview of any statutes relied upon in defense.

At this point the plaintiff offers to furnish proper evidence into the record of the price at which it sold cans of like grade and quality and of competitive sizes with those sold to the defendant during the period in question, but the plaintiff instructs the witness beyond such information to refuse to answer the question, and certifies it to the Circuit Court for determination of its propriety and admissibility.

Mr. Fowler: The defendant will of course accept the offer of the information as stated by counsel, but insists upon the entire information requested and will present its position to the court and ask ruling thereon.

[fol. 217] Mr. Allison: The plaintiff further now offers proper testimony or evidence to the defendant, if desired, showing the basis and methods employed in arriving at the scale of quantity discounts heretofore testified about and contained within the several forms of contract used by the plaintiff covering the sales of packers' cans.

Mr. Fowler: I will ask that the witness state the discounts that were allowed the Great Atlantic & Pacific Tea Company, applying the methods which counsel stated he would furnish.

Mr. Allison: The plaintiff, understanding that question to ask the percentage bracket within which such discount fell, will make no objection to the witness replying, but the plaintiff does object to an amount in dollars and cents which might have resulted from the application of such discount percentage, and instructs the witness not to answer.

I will certify that question also to the court for the reasons enumerated in the last previous certification.

Q. What quantity discount did the Great Atlantic & Pacific Tea Company receive on the packers' cans it purchased from American Can Company from June 19, 1936, to the end of the year, and if counsel does not object I will add for 1937, 1938, 1939, 1940, 1941, and 1942, so that counsel may make one objection instead of causing a number of questions to the same point.

Mr. Allison: You are asking now for the percentage?

Mr. Fowler: That is right, for each period of time.

Mr. Allison: To which question the plaintiff objects upon the several separate grounds enumerated in the ob-

jection to the preceding question, and upon the additional ground that the plaintiff will be required necessarily to [fol. 218] disclose confidential business information with such customer for the benefit of the defendant without the consent of the said named customer. And at this point the plaintiff again offers to furnish defendant the information regarding the method employed in arriving at the scale of quantity discounts as heretofore set forth.

Mr. Fowler: Do you instruct him not to answer?

Mr. Allison: The plaintiff directs the witness to decline to answer the question as propounded, and certifies the same to the Circuit Court for determination of its admissibility and propriety.

Mr. Fowler: To clarify this point, do you object, Mr. Allison, because of the fact that this calls for him giving discounts for different years, is that included in your objection?

Mr. Allison: The plaintiff for the purpose of expediting the hearing does not object to the multiple jointed question involving several years, as it might be covered seriatim.

Q. Mr. Nugent, will you refer to the records of the American Can Company and state the total amount in dollars of purchases of cans from the American Can Company, both gross and net, by Taormino Corporation, for the following years: from June 19, 1936, through the rest of that year, 1937, 1938, 1939, 1940, 1941 and 1942, of packers' cans?

Mr. Allison: To which question the plaintiff objects upon the following grounds:

First, the question is immaterial, irrelevant and improper in the light of the issues and possible issues of this cause.

Second, the question goes far beyond the scope of the notice in this cause and beyond the issues.

Third, the question seeks information which is not applicable by virtue of the defense relied upon by the defendant. [fol. 219] Fourth, the question seeks confidential information of business relations between plaintiff and a customer other than the defendant and seeks the disclosure of confidential information for the benefit of a competitor of the named customer.

Fifth, the question seeks information far beyond the sales by the plaintiff of packers' cans of like grade and

quality and competitive sizes with those purchased by the defendant during the period in question, and therefore the information sought to be elicited does not come within the purview of any statutes relied upon in defense.

At this point the plaintiff offers to furnish proper evidence into the record of the price at which it sold cans of like grade and quality and of competitive sizes with those sold to the defendant during the period in question, but the plaintiff instructs the witness beyond such information to refuse to answer the question, and certifies it to the Circuit Court for determination of its propriety and admissibility.

Mr. Fowler: The defendant will of course accept the offer of the information as stated by counsel, but insists upon the entire information requested and will present its position to the court and ask ruling thereon.

Mr. Allison: The plaintiff further now offers proper testimony or evidence to the defendant, if desired, showing the basis and methods employed in arriving at the scale of quantity discounts heretofore testified about and contained within the several forms of contract used by the plaintiff covering the sales of packers' cans.

Mr. Fowler: I will ask that the witness state the discounts that were allowed Taormino Corporation, applying the methods which counsel stated he would furnish.

[fol. 220] Mr. Allison: The plaintiff, understanding that question to ask the percentage bracket within which such discount fell, will make no objection to the witness replying, but the plaintiff does object to an amount in dollars and cents, which might have resulted from the application of such discount percentage, and instructs the witness not to answer.

I will certify that question also to the court for the reasons enumerated in the last previous certification.

Q. What quantity discount did Taormino Corporation receive on the packers' cans it purchased from American Can Company from June 19, 1936, to the end of the year, and if counsel does not object I will add for 1937, 1938, 1939, 1940, 1941 and 1942, so that counsel may make one objection instead of causing a number of questions to the same point.

Mr. Allison: You are asking now for the percentage?

Mr. Fowler: That is right, for each period of time.

Mr. Allison: To which question the plaintiff objects upon the several separate grounds enumerated in the objection to the preceding question, and upon the additional ground that the plaintiff will be required necessarily to disclose confidential business information with such customer for the benefit of the defendant without the consent of the said named customer. And at this point the plaintiff again offers to furnish defendant the information regarding the method employed in arriving at the scale of quantity discounts as heretofore set forth.

Mr. Fowler: Do you instruct him not to answer.

Mr. Allison: The plaintiff directs the witness to decline to answer the question as propounded, and certifies the same to the Circuit Court for determination of its admissibility and propriety.

Mr. Fowler: To clarify this point, do you object, Mr. [fol. 221] Allison, because of the fact that this calls for him giving discounts for different years, is that included in your objection?

Mr. Allison: The plaintiff for the purpose of expediting the hearing does not object to the multiple jointed question involving several years, as it might be covered seriatim.

Q. I will ask you, Mr. Nugent, if Bruce's Juices, Inc., did not buy for its Tampa plant more cans in value than Stokely Brothers & Company, Inc., during the period of time from June 19, 1936, to the end of 1936, in 1937, in 1938, in 1939, in 1940, in 1941 and in 1942.

Mr. Callahan: You can answer that question yes or no, Mr. Nugent.

A. I would have to answer I do not know.

Q. I will ask you if Bruce's Juices did not buy more cans for its Tampa plant from the American Can Company, of like grade and quality, than Stokely Brothers & Company, Inc. purchased for its Tampa plant from the American Can Company from June 9, 1936, to the end of the year, in 1937, in 1938, in 1939, in 1940, in 1941 and in 1942.

Mr. Allison: The plaintiff objects to the question for the reason that it is immaterial and irrelevant and attempt-

ing to segregate a phase of business with one customer and compare the same with transactions with another customer, and as not bearing upon the defense relied upon in the pleas or the statute therein sought to be invoked.

A. I do not know the answer.

Q. Does your answer "I do not know" apply separately to each year?

A. Yes, sir, that is right.

[fol. 222] Q. I will ask you if Bruce's Juice did not buy cans from the Tampa plant of the American Can Company, of like grade and quality, more cans from June 19, 1936, to the end of that year, in 1937, in 1938, in 1939, in 1940, in 1941 and in 1942, than did Stokely Brothers & Company, Inc., from the Tampa factory of the American Can Company for its Tampa plant.

Mr. Allison: Let the record show the same objection made by plaintiff to the prior question.

A. I would have to answer that I do not know.

Q. Have you any greater knowledge with reference to these same questions regarding the cans sold by the American Can Company to California Packing Corporation at Tampa?

Mr. Allison: The same objection.

A. No, sir, I have not.

Q. Once again I will ask you a question that was objected to before and I did not insist on it, or at least I do not think I did. Did the California Packing Corporation, Stokely Brothers & Company, Inc., Hawaiian Pineapple Company, Ltd., Morgan Packing Company, Libby, McNeill & Libby, Inc., The Great Atlantic & Pacific Tea Company and Taormino Corporation, or any of them, have a contract with the American Can Company during the period of time in question, or any part thereof, for the purchase of general line cans?

Mr. Callahan: That question is objected to as wholly immaterial and irrelevant to the issues here involved, and the witness is instructed not to answer it.

Mr. Fowler: For the purpose of brevity I grouped both the period of time and the numerous corporations together. Have you any objection on that ground?

[fol. 223] Mr. Callahan: Not on that ground, no, providing the same objection applies.

Mr. Fowler: Mr. Allison, a while ago I had several years included in my question regarding Stokely Brothers & Company, Inc. You did not object because I stated several years?

Mr. Allison: I so stated in the record. I have no objection.

Adjourned to April 2, 1943, at 10 A. M.

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NEXT DEFENDANT'S EXHIBIT No. 30

AMERICAN CAN COMPANY

vs.

BRUCE'S JUICES, INC.

New York, April 2, 1943.

Met pursuant to adjournment.

Present: Mr. Allison, Mr. Callahan, Mr. Fowler.

Continuation of the examination of ALLEN HERBERT NUGENT.

By Mr. Fowler:

Q. Mr. Nugent, suits are now pending in Florida by the American Can Company, as you know, against Bruce's Juices, Inc., on four promissory notes, one for $12,000 principal, one for $7,000 principal—I do not know exactly what date they came due, around May last year—one for $19,000 due May 25th, and one for $75,000 due December 31, 1942—these are approximate figures. Those notes are the notes which they renew, and the indebtedness upon which they [fol. 224] are based was for the purchase of cans, was it not?

A. Covering purchases of cans.

Q. When were those purchases made?

A. Well, I cannot tell you the exact years when they were made; they were made during this period from June 19, 1936, up to a certain time, I do not know exactly.

Q. They were all made after June 19, 1936?

A. I believe so.

Q. Do you know Mr. L. D. Jenkins?

A. Yes, sir.

Q. What is his position with the American Can Company?

A. At this time he is assistant to the general manager of sales, packers' cans.

Q. Did he hold that position in March, 1940?

A. I would have to check the record. I have forgotten just when he came into that position.

Q. Well, if he did not will you tell us?

A. Yes, sir.

Q. I will ask you if you will produce an original letter written by Bruce's Juices Inc., March 7, 1940, to Mr. L. D. Jenkins at the American Can Company, New York City, New York, during the course of this hearing, this being a one page letter.

Mr. Callahan: We will produce that.

Q. Do you have here likewise in the New York office of the American Can Company official correspondence with Mr. H. H. Howry, District Sales Manager, American Can Company, First National Bank Building, Baltimore, Maryland?

A. That was written to Mr. Howry?

Q. Yes, by Bruce's Juices.

[fol. 225] A. I could not say; that will have to be checked.

Q. In any event will you produce that original letter dated February 12, 1940, from Bruce's Juices, Inc., to Mr. H. H. Howry, District Sales Manager, American Can Company, First National Bank Building, Baltimore, Maryland?

Mr. Callahan: We will produce it if it is here in this office. I do not know whether it is.

Mr. Fowler: If it is not in the office will you perhaps save us all time by producing the original letter at your convenience and send it to Mr. Allison?

It consists of two pages.

Mr. Callahan: I would be glad to.

Q. I will ask you also to kindly produce letter dated January 2, 1940, written to Mr. Len Jenkins, American Can Company, 230 Park Avenue, New York City, consisting of two pages, signed either J. Adams Bruce or Bruce's Juices, Inc., with a copy of the American Can Company, Tampa, Florida.

Mr. Callahan: We would be glad to furnish that.

Q. Now, Mr. Nugent, going back to the paragraph of your contract providing for quantity discounts, when for example

one of your customers' total purchases of packers' cans under the provisions of the contract amount to $500,000 or over but less than $1,000,000, they get a discount of one per cent on the total sales, is that correct?

A. No, the discount is figured on the net purchases and not on the gross.

Q. In other words, if the total net money value of such purchases amounts to $500,000 or over but less than $1,000,000, such purchaser who is in that bracket gets one per cent on his total net purchases?

[fol. 226] A. That is correct, yes, sir.

Q. In other words, he does not just get one per cent on the amount over $500,000, but on the total amount?

A. On the total amount.

Q. And then that works through all the other brackets the same way, does it not?

A. Yes, sir.

Q. As listed in the contract?

A. Yes, that is correct.

Q. For example, if the total net money value of purchases of packers' cans amounts to $7,000,000, then such purchaser gets a five per cent discount on his total net money value of purchases from one dollar up?

A. He gets five per cent discount on whatever his total net purchases are after he exceeds the $7,000,000, that is there is no change in the discount rate on purchases exceeding $7,000,000.

Q. He gets a five per cent if it exceeds $7,000,000?

A. That is correct.

Q. In other words, that five per cent applies right on down to the first dollar?

A. Yes, on his total purchases. There is only one discount paid to him though.

Q. Under your contract?

A. Under the terms of the contract.

Q. Referring to Defendant's Exhibit 2 I notice the guarantee clause in the contract, which from a hasty view of all of the form contracts is the same in the various contracts, I believe that that paragraph says:

"Seller agrees to pay to buyer packers' cost of cans and contents of all cans except as herein stated, the contents of [fol. 227] which shall have been spoiled by leaks," etc. In other words, under that paragraph if there are defective

cans or damaged cans which caused your purchaser of packers' cans to lose the product put up in those cans you pay them for the actual damage they have suffered, including the cost of their product, is that correct?

A. If it is found that the side or bottom seams of those cans, speaking generally now, either the side or the bottom seam is responsible for the spoilage, then the claim is paid on the basis of that spoilage in excess of two cans per thousand, we pay for not only the cans but the contents.

Q. And that is a part of the adjustments that are made in your department?

A. Yes, sir. I would like to clarify that by asking what you mean by the part in our department.

Q. Well, there are other adjustments made, are there not?

A. On spoilage of cans?

Q. No, I am just illustrating my question there on this spoilage and damage of cans.

A. No.

Q. Now you stated yesterday, as I recall, that some times you equalized freight to a given point and some times you did not, according as I recall to the competitive situation and other considerations. If that is not correct, state it please.

A. I would say that was approximately correct.

Q. Now who in the American Can Company, which officer of which department, decides which customers on the purchase of packers' cans are entitled to the qualification of freight on a given purchase and who are not?

[fol. 228] A. The general sales department is the governing factor with regard to equalizing freight, that is we decide when to equalize freight.

Q. That is your department?

A. Yes. We do not consider it from the standpoint of customers, we consider it from the standpoint of competition and other things, not from the standpoint of customers.

Q. But you do with certain customers, as you state, on account of competition or other factors, equalize freight on certain purchases?

A. Yes, sir.

Q. Now when you equalize freight to a customer of certains cans to be delivered to a certain point, for what length of time is that equalization good? In other words, do you

do it for a period of months or years or until notice of change, or how is that handled?

A. In most cases I would say during the life of the contract?

Q. Is that provision contained in the contract?

A. There is a provision in the contract providing for freight equalization.

Q. Is that a paragraph that is written in the contract?

A. It is covered by the paragraph under the subject of deliveries. This clause reads:

> "Cans named in this contract shall be delivered as wanted by buyer, upon reasonable notice to seller, f. o. b. seller's factories, freight equalized with —— except on such sizes and styles of cans as may not be [fol. 229] made at seller's —— factory. Sizes and styles of cans seller may not make at its —— factory shall be f. o. b. point of shipment."

Q. As a matter of fact you do on occasions and have with certain of these customers of packers' cans enumerated yesterday equalized freight to your factories when that size cans were not made at that factory, is not that correct?

A. There are times when we do that for certain reasons, that is taking conditions into consideration and all that.

Q. Competitive situation?

A. Competitive situation, potential business for that territory.

Q. Potential business from the customer?

A. Potential business not only from that customer but potential business from other customers in that territory.

Q. Now when you do that is that then written into the contract you have or do you pass letters on the point or is it done orally, or what is your practice?

A. Well, usually it is done orally; once in a while we confirm it by a letter.

Q. I will now ask you if you will produce the contracts which you had with the corporations, purchasers of packers' cans, as enumerated yesterday, covering the period of time under discussion, and that is from June 19, 1936, to and through 1942.

Mr. Allison: To which request the plaintiff objects for the following reasons:

First, the request is far beyond the scope of the issues or possible issues of this cause.

Second, the request seeks evidence which is immaterial, irrelevant and improper in this cause.

[fol. 230] Third, the request seeks to compel the plaintiff to disclose for the benefit of a competitor, to wit, the defendant, certain confidential business transactions with customers of the plaintiff, to their detriment and to the benefit of the defendant; and the plaintiff having heretofore supplied at this hearing exact forms of all of the contracts covering packers' cans executed by the plaintiff with all of its customers during the period in question, and likewise having offered proper evidence to show that price on all cans of sizes sold to the defendant quoted and used in sales to other customers, and also having offered proper evidence to show the method employed in arriving at the quantity discount and also having offered evidence to show such quantity discounts were uniformly applied to all customers coming within the brackets disclosed, the plaintiff therefore declines to comply with the defendant's request and certifies the propriety and admissibility of same to the Circuit Court for determination.

Mr. Fowler: The attorney for defendant wishes to point out to attorneys for the plaintiff that by this instruction and by the instructions yesterday they are avoiding the entire benefits which the court desired to be obtained by this hearing; they have examined the president of Bruce's Juices, Mr. J. Adams Bruce, and went fully into all matters in connection with his transactions and his business; that they are now refusing to permit the defendant the same general type of examination.

Further, that the issue in this case is whether or not the transactions upon which the notes in question are based as their consideration were illegal under the Robinson-Patman Act on account of discriminations; and to re- [fol. 231] fuse to give us any information on the point prevents us from showing such discriminations, when such information is readily available in the office of the American Can Company here in New York and when it is not contended it is not available.

I particularly point out, so that counsel if they see fit may change their position, as an example of that, refusing to permit the witness to answer the question and give in-

formation as to the amount of discount each of the customers, corporations, of packers' cans referred to yesterday obtained during the years in question, in other words, not permitting us to ascertain whether or not such competitors, corporations, obtained one per cent or five per cent under their quantity discount.

Mr. Allison: Just a moment. I would like to make a statement on the record in response to that.

The plaintiff respectfully directs attention to the fact that in its examination of Mr. Bruce all questions were confined to the affirmative charges made in its sworn pleas, and the plaintiff is now willing to produce for Mr. Bruce, or for Bruce's Juices rather, any evidence desired pertaining to its transactions with the plaintiff; and the plaintiff reiterates its position that the applicable statute is not concerned with the amount in volume, either of merchandise or dollars and cents, involved in the quantity discount scale, but within the purview of the Act the uniformity of price and the uniformity and applicability alike of discount to customers falling within the same bracket is covered by the statute, and the plaintiff has stood and stands willing to produce evidence showing the uniformity of price, the method of establishing quantity discounts, and that such discounts were uniformly applied to all alike.

[fol. 232] Mr. Fowler: I respectfully point out that it takes three persons and at least two transactions to violate the Robinson-Patman Act; and discrimination requires two sales, and giving us only the information regarding this transaction with Bruce's Juices and not in connection with the sales which we insist were discriminatory, only answers half the question.

Q. Now, Mr. Nugent, have you any letters in your file with reference to either of the customers of packers' cans enumerated yesterday confirming conversations allowing freight equalization on their purchases of cans during the period in question?

Mr. Allison: To which question the plaintiff objects for the reason that it goes beyond the bounds of common sense and reason for this witness to be called upon to answer a question covering approximately seven years in time and seven or eight customers in number.

The Witness: Please read the question.

(Question read by the reporter.)

A. We may have, although I cannot answer definitely.

Q. Will you produce the letters with such customers during the period in question confirming oral conversations on the equalization of freight, for the purchase of cans with all of these enumerated customers?

Mr. Allison: To which question the plaintiff objects upon the ground that on its face it is purely fishing and seeks to compel the plaintiff to search its files over a period of seven years, and unless such question is made specific and definite the plaintiff declines, and certifies the question to the court for determination; providing, however, that the plaintiff will be glad to produce any correspondence had between it and this defendant on the point in question.

[fol. 233] Mr. Fowler: We thank you for your offer, but point out that it was brought to our attention yesterday that the American Can Company had spent $5,000 in preparing for this hearing, which we believe, in view of the court's order and the notices, should have put them on notice that we would need the contracts with these various customers, and that the letters referred to are in effect confirming oral contracts.

I, however, will be more specific.

Q. I will ask you, Mr. Nugent, if you have in your files any letters with Engelman Gardens in 1938 confirming oral conversations with your representatives for the equalization of freight on packers' cans.

A. I don't know.

Q. Will you search your files or cause same to be searched and then answer the question, and if you have such letters will you produce the same?

A. It would take a very long while to—possibly a month—to go through our files and pick out that kind of information. Furthermore, it is the policy of the company to retain correspondence for only a few years, and there is a possibility that some of the correspondence in the early part of this period is not available on account of having been destroyed.

Q. In view of your explanation will you now answer the question?

(Question read by the reporter.)

Mr. Allison: In view of the explanation by the witness that the files are voluminous and possibly some have been

destroyed, and that a considerable period of time would be employed in making such search, with consequent burden [fol. 234] upon the plaintiff at its own expense, provided that no limited time is specified within which the plaintiff will be compelled to make this search, and in the event of any divergence of opinion by counsel on the extent of a reasonable time, the point is certified to the Circuit Court.

Mr. Fowler: Now I want the witness' answer.

The Witness: Yes, under the above provision.

Mr. Fowler: You understand of course that our files won't be complete until that is done, the files of this hearing.

Q. Mr. Nugent, where is the file physically of Engelman Gardens, right in these offices here?

Mr. Callahan: What file do you mean?

Mr. Fowler: The correspondence file.

A. Part of the file is here, part of the file is in Chicago, part in Houston.

Q. Now any matter that was important enough to be a part of that contract would be in the New York office, wouldn't it?

A. I should think so.

Q. Now will you step out and go and see actually how large the correspondence file is in 1938 with Engelman Gardens, so that the court may know just how voluminous a job it is for you to look through it?

A. Yes, I can do that.

By Mr. Callahan:

Q. Is all the file in this office?

A. No, I mentioned that part of the file was in Chicago and in Houston.

By Mr. Fowler:

Q. Well, do you or do you not decline to go out now and physically look at the file and see how large the correspond- [fol. 235] ence file with Engelman Gardens is for 1938?

Mr. Allison: The plaintiff does not object to counsel's request, but desires the fact noted that from the answers of the witness the file here is incomplete, and the witness' answer would necessarily be controlled by the fact that he can

only testify the amount of time required to search through that indefinite portion of the file which may be in the New York office.

Mr. Fowler: That is all I have asked him to do at the moment.

Mr. Allison: All right, we will adjourn while the witness does that.

(Short recess.)

Mr. Allison: Let the record show that the plaintiff now produces for counsel the three letters heretofore requested.

Mr. Fowler: I am willing to have the originals returned to you and have copies substituted.

Mr. Allison: By agreement of counsel copies will be substituted.

Mr. Fowler: I now offer in evidence as Defendant's Exhibits 30, 31 and 32 the following letters:

Letter from Bruce's Juices, Inc., to Mr. Len Jenkins, American Can Company, 230 Park Avenue, New York City, dated January 2, 1940, signed Adams.

Copy of the letter was marked Defendant's Exhibit No. 30, April 2, 1943, C. B. (which exhibit will be certified and presented to the Court under proper procedure).

Mr. Fowler: I also offer in evidence letter produced by plaintiff from Bruce's Juices, Inc., to Mr. H. H. Howry, District Sales Manager, American Can Company, First [fol. 236] National Bank Building, Baltimore, Maryland, dated February 12, 1940, and ask that it be marked Defendant's Exhibit 31.

Copy of the letter was marked Defendant's Exhibit No. 31, April 2, 1943, C. B. (which exhibit will be certified and presented to the Court under proper procedure).

Mr. Fowler: Also letter from Bruce's Juices, Inc., to Mr. L. D. Jenkins, American Can Company, New York City, New York, dated March 7, 1940, and ask that it be marked Defendant's Exhibit 32.

Copy of the letter was marked Defendant's Exhibit No. 32, April 2, 1943, C. B. (which exhibit will be certi-

fied and presented to the Court under proper procedure).

Q. Mr. Nugent, you now inform me that Mr. L. D. Jenkins became assistant sales manager for American Can Company, is that right?

A. Assistant to the general manager of sales.

Q. On May 1, 1939, is that correct?

A. That is correct, as to packers' cans.

Q. Mr. Nugent, Mr. L. D. Jenkins and Mr. Len Jenkins is one and the same person, is he not?

A. Yes.

Q. Now, Mr. Nugent, after having been gone a few minutes you have returned. How voluminous did you find the correspondence files with Engelman Gardens for the year 1938?

A. I found it a sizable file for that year.

By Mr. Allison:

Q. 12 inches?

A. It is a good big file. That is just the file in our office.

By Mr. Fowler:

Q. That is all we are talking about at the moment.

[fol. 237] A. In the sales office—but I have also learned that there are files in that year in the auditing department, in the credit department, and in one or two other departments, which would have to be gone through in order to determine whether there was anything said in that year in reference to freight equalization, because in some letters there are a number of matters spoken about and we have to determine which one is the most prominent matter in deciding which department that letter should go to, that is what file it will come to rest in.

Now then, with our limited force today on account of the number of people that have gone into the Army or the armed forces, we could do this kind of work only in spare moments. The people who have done the filing heretofore, and nothing else but that, are now being used on other jobs to help out in the emergency.

Q. I am willing to concede on the record that we are all overworked and have a great deal of war work at this time

and appreciate that situation, but if you want to go ahead with it, continue.

A. We would naturally have to search all of these files which are located on various floors of the company's office here in New York, and in order to find what we were looking for it would mean that people from the sales department, the file clerk or some other person, would have to do the searching.

Q. Do you mean that you do not keep your contracts and supplemental contracts in a file to themselves, with your customers for packers' cans?

A. As far as contracts are concerned they are located in what we call the contract department.

Q. And if there are supplemental contracts made orally which happened as you say to be confirmed in writing, which modified the provisions of that contract, they would not be [fol. 238] with the contract?

A. That would be true as far as the supplement to a contract is concerned; but you asked about freight equalization, anything that was said in regard to freight equalization.

Q. Any agreement made to permit freight equalization on certain purchases; that is what I said.

Mr. Allison: In other words, the point is whether letters which might be construed as supplementing a contract are filed with the contract file?

Mr. Fowler: That is right.

The Witness: That would be true. I just want to say that we possibly could go through our files, estimated by the man that would do the job, in about ten days or a little better.

Mr. Fowler: Thank you.

Q. Mr. Nugent, I will ask you to search or have searched the files of the American Can Company to see what if any oral contracts for freight equalization were confirmed by letter with Engelman Gardens in 1939, 1940, 1941 and 1942; with Border Packing Company in 1938, 1939 and 1940; with California Packing Corporation in 1937, 1938, 1939, 1940, 1941 and 1942; with Stokely Brothers & Company, Inc., in 1937 through 1942 inclusive; with Hawaiian Pineapple Company, Ltd., in 1937 through 1942 inclusive; with Libby, McNeil & Libby, Inc., Morgan Packing Company and The Great Atlantic & Pacific Tea Com-

pany in 1937 through 1942 inclusive, and with Taormino Corporation in 1938 and 1939; and produce such letters.

Mr. Allison: Is it understood that in the event the correspondence deals with other subjects than freight equalization the plaintiff may produce the excerpt dealing with freight equalization, with proper memoranda concerning the date and identification of the letter?

[fol. 239] Mr. Fowler: Yes.

A. In answering the above in regard to Engelman Gardens, the answer as given applied for the year 1938 only. If it is necessary to go through the files of Engelman Gardens for the years 1938 to 1942 inclusive then it will take considerably more time than the time mentioned above; the Engelman Gardens Company is one of the smaller of the accounts listed and naturally their correspondence with an account of this size, or Border Packing Company, would be small as compared to the correspondence with these larger customers mentioned, such as California Packing Corporation, Stokely Brothers & Company, Inc., Hawaiian Pineapple Company, Ltd., Libby, McNeill & Libby, Inc., Morgan Packing Company and The Great Atlantic & Pacific Tea Company. It would take considerably longer to go through any one year's correspondence of any of these larger accounts than going through the Engelman Gardens file. In order to go through all the years of the files of the various accounts listed it will take a very long while, possibly months, especially in view of the limited organization that we have at this time. But I shall go through these files, with the understanding that the time is not limited for doing the work.

Q. Mr. Nugent, what were the purchases of the 2.02 by 3.12 cans of Engelman Gardens in 1938?

Mr. Allison: To which question and all similar questions the plaintiff objects for the reason that it is immaterial and irrelevant and beyond the scope of the issues or possible issues herein.

Second, that the information sought has no bearing on price discrimination relied upon in defense.

Third, that the information sought seeks to obtain confidential business information concerning transactions with a competitor of the defendant for the benefit of such

[fol. 240] defendant, and to the detriment of such customer.

And the witness is instructed not to answer this or any similar question, and the question is certified to the Circuit Court for determination as to propriety and admissibility.

Mr. Fowler: For the purpose of completing the record I will ask the witness the same question for the years 1939, 1940, 1941 and 1942, to which I understand Mr. Allison makes the same objection and gives the same instructions, with the same certification.

Mr. Allison: That is correct.

Q. Mr. Nugent, what price did American Can Company charge Engelman Gardens for the 2.02 by 3.12 cans in 1938 through 1942, specifying the changes in price from time to time?

Mr. Callahan: You may refer to any paper you want to.

Mr. Allison: Let the record show that the witness is now refreshing his memory by examining duplicate original of Plaintiff's Exhibit No. 1, heretofore so marked for identification.

A. The plain can price of this can is set forth in the exhibit, Plaintiff's Exhibit 1 for identification; it shows that the price of this can was $10.55 a thousand for the year 1938——

Q. Tell me to what point that is, and if there is any change state it.

A. That price would be through the year 1938.

1939, the price to Engelman Gardens was, from January 1, 1939, $10.06 a thousand; on September 28, 1939, it was reduced to $10 a thousand on the basis of using 85 pound plate throughout, and on the basis of using 75 pound plate throughout the price was $9.68. That $9.68 price went into effect on September 28, 1939.

Q. When you say $9.68 or any other figure that is, in accordance with the custom of the trade, referring to 1,000 cans, is it not?

[fol. 241] A. Per thousand cans.

I think it was in 1940 that Engelman Gardens changed its name because of reorganization to Engelman Products Company.

The price of 2.02 by 3.12 plain cans in 1940 was $9.68 a thousand.

In 1941 the price was $9.68 a thousand.

The price in 1942 was $9.68 a thousand.

The prices which we have mentioned for Engelman Gardens were f. o. b. Houston, Texas.

Q. Have you ever been in the office at the plant of Engelman Gardens?

A. Yes, sir.

Q. Where is the plant and office located?

A. Elsa, Texas, I think it is, although they have their address I am quite sure at Edenboro, Texas.

Q. Approximately how far is Edenboro from Houston?

A. About 400 miles I should say as an estimate.

Q. Do you have a plant, the American Company, at Houston, Texas?

A. Yes, sir.

Q. Has that plant been there during the period of time we have been discussing?

A. I have forgotten the year in which it was built.

Q. What is your best recollection of it? Which you may correct at any time.

A. I think it was in 1936 that the factory was built.

Mr. Callahan: I feel from the records that it was in 1935.

Mr. Fowler: It is unimportant.

[fol. 242] Q. 1935 or 1936 you would say, would you, as you remember it?

A. When the factory was completed?

Q. Yes.

A. I don't know whether it was completed in either of those two years; it may have been completed in 1937.

Q. Now, in 1938, 1939, and 1940, Engelman Gardens was packing juice in 2.02 by 3.12 cans, was it not?

A. They were buying from us the 2.02 by 3.12 cans.

Q. And they had them lithographed, did they not?

A. I know that the larger portion of them was lithographed.

Q. And the lithograph bore the mark of the type of juice they contained, did it not?

A. Yes, I am quite sure of that.

Q. And don't you know they were packing juice at this point?

Mr. Allison: At this point the plaintiff calls attention to the fact that the same type of inquiry was indulged in yesterday, and after considerable objection and argument the witness was instructed to answer to the best of his personal knowledge; and the same instruction is now given, that he is hereby advised he may answer to the best of his personal knowledge as to what products the subject of inquiry packed in the presently described or any other type of can.

A. To the best of my knowledge they were packing citrus juices in these small cans.

Mr. Callahan: Mr. Fowler, we have checked the record and found that the Houston factory was completed in the early part of 1936 and opened for operation at that time.
[fol. 243] Mr. Fowler: Thank you.

Q. Mr. Nugent, when an allowance has been made for the equalization of freight how is it handled as a bookkeeping item?

A. Do you mean how do we credit freight equalization?

Q. Yes, what are the mechanics of it?

A. It shows on the order the freight rate from our factory to the customer's factory, and the freight rate from the nearest basing point, which may be a competitor's factory of our own, to the customer's plant, and the difference between these two rates represents the amount of freight per hundredweight that we assume and which is treated on the invoice covering the shipment of cans; that is per hundredweight in each case, the rate per hundredweight.

Q. Now is it not also the practice of the American Can Company to have the purchaser pay the freight when the cans arrive, and receive a credit memorandum against their account?

A. No, sir.

Q. That is never done?

A. No, sir.

Q. You always deduct it in the first place?

A. It is credited on the face of the invoice.

Q. And that freight charge is never placed on your books against the customer?

A. I do not understand the question.

Q. The customer's account never shows that charge for freight which may be afterwards credited?

A. I cannot answer that, because that is handled in the auditing department. I do not know what their system is of setting up on their records the amount of freight that we assume in equalizing.

[fol. 244] Q. You indicate to the auditing department the amount of freight and then you do not know how they actually handle the credit?

A. We do not indicate to the auditing department; they receive a copy of the invoice to the customer and are guided by what is shown on that invoice.

Q. I believe you stated for me when this freight should be equalized, and then it goes on the invoice, is that correct?

A. Yes, sir, that is correct.

Q. Now just how is the mechanics of the records of purchases made? For example a customer gives an order for so many cans, what records are used in that transaction? For example, do you use invoices?

Mr. Allison: Why not take a typical case?

Mr. Fowler: That is all right.

A. If John Doe places an order for No. 2 cans, either by letter or by telegram or any other method, that order is written up on a form that we have covering orders to the factory or factories; the factory upon receipt of this order, either from the district sales office of the company or from a local office of the company, fills it in accordance with the provisions of that order; and after shipment is made the factory renders an invoice against the customer showing the various terms, sizes of cans, containers used, etc; this invoice is made in several copies, and these copies are distributed to several offices of the company. I believe that the first copy of the invoice is sent to the auditing department in New York.

Q. Now on occasions do you not get orders from a customer to deliver cans to various plants of that customer from various American Can Company factories or distributing points?

The Witness: I cannot quite get the question. Please read it.

[fol. 245] (Question read by the reporter.)

A. I presume you mean ship cans and not deliver cans. All of our cans are sold f. o. b. factory—all of our packers'

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cans are sold f. o. b. factory. There are times, especially with large customers, where they have a number of factories throughout a certain territory, where we do ship cans from different factories to these plants, depending upon the location of them and the location of our factories.

Q. Now these orders for cans show on the face of them whether or not there is to be freight equalization and on which part of the order, do they not?

A. Our order to the factory?

Q. The order of the customer to your representative.

A. The order from the customer does not contain that detail.

Q. When is that detail placed on the order?

A. It is placed on the order at the time the sales office makes the order for the factory.

Q. For the American Can Company factory?

A. Yes.

Q. From one of your large customers an order could come in to your New York office to have cans delivered in several States, shipped from your factories in several States to the various plants of that customer—that is the practice, is it not?

A. It is not.

Q. It is not?

A. The American Can Company has laid out the territory of the continental United States into four parts, two of which are known as divisions and two as districts. During [fol. 246] the period from June 19, 1936, to the latter part of the year 1942 all of these were known as district offices, at which time there were five instead of four separated territories. Customers located in these divisions and districts usually sent their orders either to a local office or a district office of the American Can Company in the territory where they are located.

Q. In what district is Texas?

A. Texas is in the American Can Company's southern territory and is in what is known today as the central division.

Q. Do you sell all of your cans in Texas through the American Can Company Southern?

A. In Texas that is true.

Q. Now you used the word containers a while ago; does that refer to can containers—I mean containers of cans?

A. Containers of cans—that means packages of various kinds in which cans are packed.

Q. Now those containers of cans are sometimes purchased by the customer and sometimes purchased by the American Can Company, is that true?

A. I just don't quite get your question.

Q. Well, who buys the containers?

A. It is the usual practice for the canner to buy his own containers.

Q. That is the custom?

A. Yes, sir. In a few instances the canners ask that we supply their cans in cases. We purchase cases in the flat—what is known as in the flat; by flat we mean not made up, knock-down, which are used to accomodate those customers who ask that their cans be shipped in cases.

[fol. 247] Q. What type of container is used? In other words, do you ship all the cans which you produce, where you purchase the container for the customer, in the same type of container?

A. Are you referring to cases?

Q. I am referring to the type of container that comes knocked down that you referred to.

A. No, we have two cases which are known as standard, one being a corrugated case and the other a fiber board case.

Q You buy those in large quantities, do you not?

A. Comparatively speaking, from the standpoint of production of cases, our purchases are very small.

Q. For how many of your customers that handle packers' cans listed in this group of customers as enumerated yesterday do you buy containers, for which ones of those purchasers?

Mr. Allison: Is it understood that the question refers generally from time to time during the period mentioned, or is the witness to be specific?

Mr. Fowler: We will see what he answers.

A. The cases that we purchase are what we call standard cases and may be used for certain sizes of cans, and are shipped to various customers and are not confined or purchased for the use of any one customer.

Q. I believe you explained that part of your customers buy their own containers and furnish them to you, is that correct?

A. That is not correct, because their purchases are delivered to their factory and not to ours, not to the American Can Company, their purchases of cases.

Q. Then you do buy containers for a part of your customers, and other customers have to buy their own containers, is that correct—or do they buy their own containers?

[fol. 248] A. We do not buy cases for any particular customer or customers; we have a supply of containers of the standard type on hand to take care of any canner's requirement to the extent of our ability in furnishing these cans in cases.

Q. I will ask you if it is not true that you do furnish all of the containers for certain of your customers.

Mr. Callahan: If you know.

A. I cannot answer that definitely; I do not know.

Q. You would not say it is not true, would you?

A. I would not want to say.

Q. I will ask you whether or not you furnished containers for Engelman Gardens in 1938, 1939, 1940, 1941 and 1942—of course with the name changed at the time you mentioned in your testimony.

A. I am unable to answer that question without referring to records.

Q. Will you refer to the records and give us that information at your reasonable convenience?

A. Yes.

Q. Now what allowances were made Engelman Gardens in 1938, 1939, 1940, 1941 and 1942 as the result of damaged or defective cans?

Mr. Allison: Mr. Fowler, will you agree to limit the question to cans of competitive sizes to those purchased by the defendant during the periods named? I have in mind that this constitutes a considerable burden of research and would not be material on cans that were not competitive.

Mr. Fowler: That will be all right.

Mr. Callahan: And further will you amend your question and in place of the word "allowances" call it "claims" which were recognized and paid?

[fol. 249] Mr. Fowler: Claims which were recognized and allowances made thereon.

Mr. Allison: Paid thereon. Your thought of an allowance is that they got the cash or the equivalent?

Mr. Fowler: Yes. Mr. Allison, in view of the fact that an allowance on any packaged cans could be a basis of discrimination to our competitors, and it would not have to be an allowance on cans of like grade and quality, I will have to ask that my question be based on packers' cans.

Mr. Allison: In view of the fact that any claims which were recognized on cans not competitive with the defendant and therefore which would not come within the purview of the statute relied upon are immaterial and irrelevant for the purposes of this inquiry and in the light of the issues formed and to be formed herein, the plaintiff declines to accede to the request of the defendant and certifies the question to the Circuit Court for determination as to admissibility and propriety. But in this connection the plaintiff does offer to furnish the information requested concerning cans of sizes competitive with those purchased by the defendant during the period mentioned, which information will of course only be available after a proper research through the records is made, which will be done with reasonable promptness.

Mr. Fowler: Mr. Allison, will you consider, for the sake of brevity, that the same question is asked as to each of these customers for each of the years under consideration?

Mr. Allison: Yes, with the same position taken by the plaintiff as explained to the initial question.

Mr. Fowler: And with the same certification to the court?

[fol. 250] Mr. Allison: Yes.

Mr. Fowler: Now I will ask you if you will furnish a list of such claims and allowances paid or credited thereon on cans which we have referred to previously as competitive or of like grade and quality to those purchased by Bruce's Juices, by each of these corporations during each of the years enumerated.

Mr. Allison: The plaintiff will furnish such information covering claims for defective or damaged cans which were approved and acknowledged for payment by plaintiff during the period mentioned of the several named corporations on cans of competitive sizes of those purchased by the defendant.

Mr. Fowler: Will you give the date of the allowance of such claims likewise?

Mr. Allison: Yes, that will be on the same memorandum.

Mr. Fowler: While this has been a discussion of counsel, shall we consider it as the witness' answer, by agreement?

Mr. Allison: By agreement, yes.

Q. Now you have a canning plant at Austin, Indiana, do you not?

A. We have a can manufacturing plant at Austin, Indiana.

Q. Did you have such a plant there during this period of time under discussion?

A. Yes, sir.

Q. Do you manufacture at that plant now and have you at all times during this discussion or at any time during the discussion, the can described as 2.02 by 3.12?

The Witness: May I have the question?

(Question read by the reporter.)

A. No; I do not know, because that comes under the manufacturing end; I would have to inquire.

[fol. 251] Q. Will you investigate and then answer the question?

A. Yes, sir.

Q. If you do state that they did manufacture them in any year or any years will you state the years in which they manufactured them at that plant?

A. Yes, sir.

Q. Now there is located at Austin, Indiana, a plant of the Morgan Packing Company, is there not?

A. Yes, sir.

Q. That is one of your large customers, is it not?

Mr. Allison: I object to the form of the question. The adjective "large" is a relative term that might be interpreted differently in the minds of different persons.

Mr. Fowler: Counsel has already instructed the witness not to tell us how many cans a customer buys, the volume of the customer's purchases, and I feel that he should at least leave me some general adjectives.

Mr. Allison: I will add the further ground of objection that it calls for a matter of opinion on the part of the witness. We are not instructing him not to answer.

Mr. Callahan: Can't you revise your question?

Mr. Fowler: Yes, I think I can.

Q. It is one of your best customers and one of your largest purchasers of cans, is it not?

Mr. Callahan: Same objection. We will stipulate that it is a customer and purchases cans.

Mr. Fowler: I am not satisfied with the stipulation.

(Question read by the reporter.)

A. It is one of our customers considered in that group of the larger customers, and a very good account.

[fol. 252] Q. That is likewise true of Stokely Brothers & Company, Inc., is it not?

A. Yes.

Q. It is likewise true of California Packing Corporation, is it not?

A. Yes, sir.

Q. Unfortunately Bruce's Juices is not so considered, is it?

Mr. Callahan: I object to the form of that question.

Mr. Fowler: I will take out "unfortunately."

Q. Bruce's Juices was not so considered?

Mr. Callahan: I object to that question.

Mr. Allison: For the reason that it seeks for the opinion of the witness and that it does not specify whether it applies to the volume of purchases, promptness of payment or other features which might determine the desirability of a customer.

Mr. Callahan: And on the further ground that the question in the form asked is argumentative.

Mr. Allison: Add another ground, that it also encroaches upon the field of policy, with which it is not shown this witness is authorized to deal or speak.

Mr. Fowler: Do you instruct him not to answer?

Mr. Allison: No, I do not believe we will instruct him not to answer.

Mr. Callahan: He can answer any way he feels like.

(Question read by the reporter.)

Q. Is Bruce's Juices considered among the group of customers in which you stated that the Morgan Packing Company, California Packing Corporation and Stokely Brothers & Company, Inc., were considered?

[fol. 253] Mr. Callahan: What fact is called for in that question?

Mr. Fowler: I won't argue with you, Mr. Callahan.

Mr. Callahan: No fact is asked for in that question. You are asking for the operation of the witness' mind, and that is not a fact, and you know that.

Mr. Fowler: I will state that I am not asking for the operation of the witness' mind, I will state that the witness' evidence clearly shows that there are different groups considered better customers, or very best customers, and that he has listed three of the corporations that we have enumerated as among them, and I simply want to know if Bruce's Juices was considered in that group by the American Can Company.

Mr. Callahan: Answer that question, Mr. Nugent, any way you see fit; and explain it if you care to.

Mr. Fowler: I believe that the witness is supposed to answer according to the facts.

Mr. Callahan: The question is highly irregular and unusual, hence the instruction.

The Witness: I will say this, that the customers mentioned buy more cans from the American Can Company annually than the Bruce's Juices Company, but we considered the Bruce's Juices as being one of our good accounts, such as is mentioned above for the Morgan Packing Company.

Q. Mr. Allison made some observation a moment ago which I might or might not have understood. Based upon my interpretation of it I will ask you how the volume of purchases of Bruce's Juices compared with Morgan Packing Company's during this period of time.

[fol. 254] Mr. Allison: To which inquiry and all others along the same line the plaintiff objects upon the grounds heretofore interposed to similar inquiries, to wit:

First, the question is immaterial and improper.

Second, the question goes beyond the scope of the issues or possible issues herein.

Third, the question is not material to the consideration of the applicable statute relied upon by the defendant.

Fourth, the question seeks disclosure of confidential business relations with customers of the plaintiff competitive with the defendant, solely for the information and benefit of the defendant.

And the witness is instructed not to answer the question, and the same is certified to the Circuit Court for determination of its admissibility and propriety.

Q. Mr. Nugent, did the Morgan Packing Company can juices in both large cans and in the 2.02 cans in 1937, 1938, 1939, 1940, 1941 and 1942, or in any of those years?

Mr. Allison: To which question the plaintiff objects upon the ground that it is multiple and unable to be answered by the witness.

Mr. Fowler: I withdraw the question.

Q. Mr. Nugent, I will ask you if the Morgan Packing Company canned juice in cans of 2.02 diameter and larger cans in 1937.

Mr. Allison: To which question the plaintiff objects for the reasons, to wit:

First, it is immaterial and irrelevant whether the subject—inquiry canned products in sizes not competitive with the defendant.

The question is further objected to upon the several grounds enumerated to the preceding question.

[fol. 255] And the witness is instructed to answer only that part of the question referring to cans of 2.02 diameter; and the remainder of the question is certified to the Circuit Court for determination.

Which leaves you in the position of answering whether Morgan Packing Company canned juices in 2.02 cans.

Mr. Callahan: According to your knowledge.

Mr. Fowler: According to the facts.

(Question read by the reporter.)

A. We sold the 2.02 diameter cans to the Morgan Packing Company in the period mentioned, and to my best knowledge and belief in the year 1941 they used that can for tomato juice, that diameter can; although I was not in Morgan's factory in that year, so I am unable to state definitely that the cans were used for tomato juice.

Q. I will ask you if you did not also sell them cans of that diameter and the height of 3.12 in 1938, 1939, 1940 and 1942.

A. We did not sell them that can during the years 1938, 1939, and 1940; and the record I have before me does not include the year 1942.

Q. Will you get that information?
A. I shall.
Q. Can you get it during the noon hour?
A. I believe that we can.
Q. Now I refer to the fact that you stated you would get the information for us as to whether or not your plant at Austin, Indiana, manufactured a 2.02 by 3.12 during any of this period, and if so what portion of it. Could not the small bit of information be found out by you during the noon hour so you could tell us after lunch?
A. I think so.

[fol. 256] Mr. Fowler: Is counsel ready to turn to the work of refreshment?
Mr. Callahan: Yes.

At this point a recess was taken until 2 P. M.

After Recess

Mr. Fowler: While we are waiting for the witness to return, inasmuch as Mr. Callahan properly asked who the gentleman sitting with Mr. Bruce, Mr. Bruce's nephew and myself was, I will ask the gentleman who is advising us to state his name and his firm and his business.

Mr. O'Connor: Patrick J. O'Connor; I am with Farquhar J. MacRae & Company, 90 Wall Street, and we are certified Public accountants, and I am a certified public accountant of New York State.

Mr. Callahan: I have had copies made of these three letters, Mr. Fowler. Copies are substituted as correct copies of Defendant's Exhibits 30, 31 and 32.

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Continuation of the examination of ALLEN HERBERT NUGENT.

By Mr. Fowler:

Q. Mr. Nugent, I will ask you to state whether or not it is the fact that the American Can Company manufactures and sells more cans than any other can company in the United States.

Mr. Allison: I object to the question on the ground that it is immaterial and irrelevant and far beyond the scope of the issues or possible issues in this case.

Second, that it is apparent that an effort is made to confuse the issues of this case with that which has been referred to as pending in the United States District Court for the [fol. 257] Southern District of Florida, wherein the defendant in this cause is plaintiff and the plaintiff in this cause is defendant.

There is no instruction not to answer.

A. Is this question confined to these packers' cans?

Q. No, sir.

A. To my best belief and knowledge the American Can Company is the largest producer of cans in the United States.

Q. I will ask you to state whether or not it is not a fact that your nearest competitor is the Continental Can Company.

Mr. Allison: Which question is objected to on the several grounds enumerated to the preceding question.

A. That is correct.

Mr. Allison: Now comes the plaintiff and moves to strike each of the two preceding questions and answers from this record and from consideration herein upon the several grounds enumerated in the objection to such questions.

Q. In reference to the method of keeping your records in the American Can Company, the billing is made from the individual can factories of the company, is it not?

A. The invoicing of the cans in some cases is done at the factory.

Q. Now the billing clerk has instructions in reference to the customers who are entitled to have freight equalized on their orders, do they not?

A. Each order shows as to whether there is to be any freight equalization on such shipment—it is covered by that order.

Q. Where does the information come from that goes on that order?

A. It comes from a record kept in the office from which the orders emanate, or from which the orders are made.

[fol. 258] Q. A duplicate of that information is kept on file here in the New York central office, is it not?

A. No, sir.

Q. Do you state that there is no record in this office of the customers that are entitled to have freight equalized?

A. Yes, sir, I would say that there is that kind of a record kept here, but not by the orders.

Q. How is it kept here?

A. It is kept by the invoices.

Q. Kept by the invoices?

A. And the contract itself.

Q. I believe you stated that the price to Engelman Gardens of the 2.02 by 3.12 cans was reduced on September 28, 1939, to $9.68 per thousand, and has remained at that price through 1942, is that correct?

A. That price is correct and has been used as stated by you for the plain can since September 28, 1939, and which is on a five dollar tin plate basis.

Q. Will you also tell me when you first sold to any of the customers heretofore enumerated in this hearing the 2.02 by 3.12 can at that price after September 28, 1939?

The Witness: I cannot quite follow the question. Will you repeat it?

(Question read by the reporter.)

A. That price has been in effect and is available to all customers in the territory east of the western boundary line of Montana, Colorado, New Mexico, and in the territory known as the American Can Company Southern, and f. o. b. point at certain factories.

Q. Now once again, when did you sell to any of these customers mentioned the 2.02 by 3.12 cans at this price made [fol. 259] to Engelman Gardens on September 28, 1939?

A. I do not have that information available. I would be happy to get it.

Q. Will you kindly produce it at your convenience?

A. Yes.

Mr. Fowler: Now I have a few other questions to ask Mr. Nugent, but he is waiting for some information, and if it is agreeable to counsel I will ask that a witness be produced familiar with your records and bookkeeping and accounting system for examination, and then be permitted to recall Mr. Nugent.

Mr. Callahan: Do I understand you are going to ask Mr. Nugent with respect to the matters which he is to investigate?

Mr. Fowler: I do not restrict myself to it, but that is my opinion at the moment, there may be something that I have

overlooked, but at the present time I have only in mind a few other questions to ask him. If that is not quite agreeable I will ask no favors.

Mr. Callahan: It is my suggestion that the more orderly procedure would be for you, Mr. Fowler, to exhaust your examination of Mr. Nugent on those matters that you are able so to do at this time. Is it not your intention to interrogate this witness in respect to the basic upon which quantity discounts are allowed by American Can Company, that being in my opinion one of the issues here involved in this suit?

Mr. Fowler: We will proceed according to the orderly procedure as suggested by counsel.

Q. Mr. Nugent, I will ask you if you will produce the original of a letter written by Bruce's Juices or J. Adams Bruce on behalf of that corporation to Mr. Len Jenkins, care of American Can Company, 230 Park Avenue, New York City, dated June 17, 1940.

[fol. 260] Mr. Callahan: The answer to that question is yes.

Q. Have you been able to ascertain, Mr. Nugent, whether or not your factory at Austin, Indiana, manufactured the 2.02 by 3.12 cans to the end of the period of time under discussion here?

A. I am awaiting that information now; there is a man who has been appointed to obtain it and I am expecting it any minute.

Q. While we are waiting for that let me ask you, Mr. Nugent, to state whether or not California Packing Corporation was able to obtain a quantity discount on the cans it purchased of the total net money value sufficient to justify the discount hereafter mentioned, in 1936, a discount of from three to five per cent.

Mr. Allison: The plaintiff objects to the question as framed and propounded for the reason that the same calls for information which is immaterial, irrelevant and improper.

Second, information which goes beyond the scope of the issues or possible issues herein.

Third, the question seeks to ascertain information of a confidential business nature between the plaintiff and cus-

towers other than the defendant for the information and benefit of the defendant.

And the plaintiff instructs the witness not to answer the question, and certifies the same to the Circuit Court for determination of its admissibility and propriety.

And at this point the plaintiff states that if counsel cares to inquire whether the subject inquiry made sufficient purchases to be entitled to a discount in the quantity discount scale there will be no objection to such general question.

[fol. 261] Mr. Fowler: I will next ask the witness, I will repeat the same question as to the same time, except substitute from 2 to 5 per cent inclusive, to which I take it counsel takes the same action as to the previous question.

Mr. Allison: That is correct, sir.

Mr. Fowler: I will now ask counsel if it is agreeable to consider those two same questions asked as to Stokely Brothers & Company, Inc., Hawaiian Pineapple Company, Ltd., Libby, McNeill & Libby, Inc., Morgan Packing Company and The Great Atlantic & Pacific Tea Company.

Mr. Allison: To expedite the hearing and shorten the record it is agreeable to the plaintiff that it may be taken and considered that those two questions are made to the subject parties named and that the plaintiff interposes the same objection and action in each instance.

Mr. Fowler: Likewise to expedite the record, is counsel agreeable to consider the same question as asked about all the corporations mentioned, including the California Packing Corporation, for the years 1937, 1938, 1939, 1940, 1941 and 1942?

Mr. Allison: We are also agreeable to that. We are willing for you to inquire concerning the status of the defendant's own account, but with regard to the several others named we are agreeable to have the record show that the same objections would apply and the same action by the plaintiff would also be taken.

Q. I will now ask you, Mr. Nugent, whether or not the total net money value of the purchases of the California Packing Corporation for 1936 entitled it to a cumulative quantity discount under your contract.

Mr. Callahan: Is your question limited to that period in 1936 from June 19th to the end of the year?

[fol. 262] Mr. Fowler: The effect of it yes; but I take it that the discounts, if any, would be figured on the entire

year's operations, and that therefore the total of the year would be added together to arrive at the discount, hence the question in that form.

(Question read by the reporter.)

Mr. Callahan: What is meant by the word "cumulative" as used?

Mr. Fowler: That all their purchases were simply added together and the accumulation of that amount entitled them to come within one of these brackets as listed in your contract.

Mr. Callahan: Referring only to packers' cans, I take it?

Mr. Fowler: As to packers' cans, yes, sir.

Mr. Callahan: Do you understand the question, Mr. Nugent?

The Witness: Not the way it is drafted. Would you mind reading it again?

(Question read by the reporter.)

Mr. Callahan: If you understand the question, you may answer it.

The Witness: I think I can put it in such a way by asking a question. By this do you mean were the purchases by the California Packing Corporation from January 1, 1936, to June 18, 1936, inclusive, to be added to those purchases of the California Packing Corporation from June 19th to December 31st, 1936, in order to arrive at a discount applicable to that volume and applied to the purchases from June 19, 1936, to December 31, 1936?

Q. I gather that we are arrived at the same point, the same question, yes.

A. I think that is so, although I want to check the records. It is too long ago to remember.

[fol. 263] Q. Will you check the information and furnish it to us?

A. Yes, sir.

Q. I notice in your contract it refers to Sanitary cans. What is the difference between packers' cans and Sanitary cans?

A. There is no difference. The word "Sanitary" came into being back at the time that there was a Sanitary Can Company.

Q. Don't you refer to your general line cans also as Sanitary cans?

A. Not certain types of them.

Q. Well, then Sanitary cans does include certain types of general line cans, does it not?

A. I do not know just what you mean by the question.

Q. What does this mean, to what cans does this refer:

> "In the event that buyer shall purchase of and pay seller for Sanitary cans and containers in an amount which is between $7,000,000 and $500,000 in any calendar year of the term of this contract, seller agrees to pay to buyer a discount according to the following schedule"?

A. I would say any cans that were sold under this kind of contract, which is a packers' can contract, those purchasers are entitled to these discounts.

Q. I will ask you if you have another contract for Sanitary cans.

A. Packers' can contracts?

Q. In addition to the contract you have in your hand.

[fol. 264] Q. Now as a matter of fact this does include, according to its terms, in addition to packers' cans Sanitary cans in arriving at this discount, does it not?

A. They are one and the same.

Q. Didn't you state just a few minutes ago that there were certain general line cans referred to as Sanitary cans in your corporation?

A. I do not think I did. I do not think I answered that way.

Q. Is that correct or is it not correct?

A. I am testifying here only from the packers' cans standpoint; that information would have to come from another source.

Q. Then you do not know whether the term "Sanitary cans" includes other than packers' cans or not, do you?

A. I am trying to think—I prefer that the party who is familiar with the general line side of our business answer that question.

Q. Now you are the general manager of sales of this corporation?

A. Packers' cans, yes.

Q. Packers' cans of this corporation—and I hold in my hand a form of contract that you use for packers' cans?

A. Yes.

Q. And you do not know what this term "to pay seller for Sanitary cans" means?

A. I know that where the words "Sanitary cans" are used, the term "Sanitary cans" is used in this packers' cans form of contract, is the same as if it said "packers' cans."

Q. You know also, though, that at least a portion of your [fol. 265] general line cans are also referred to as Sanitary cans, don't you?

A. I do not know that. As I said before, I am not familiar as to whether the general line department refers to some of their cans as "Sanitary." All cans sold under this type of contract are known as Sanitary or packers' cans.

Q. Now you would not say that there are not certain other lines of cans sold by the American Can Company known as Sanitary cans, would you?

A. Well, I do not know just how to answer that, because I have tried to say that the cans sold by the general line department, whether they call such cans as an oil can a Sanitary can or not I don't know.

Q. You do not know, that is all right.

A. I do not know whether they refer to that as a Sanitary can.

Q. I will ask you whether or not the California Packing Corporation likewise secured a like discount under the paragraph heretofore referred to of their contract, for each of the following years, 1937, 1938, 1939, 1940, 1941 and 1942.

A. They did.

Q. In each year mentioned?

A. Yes, sir.

Q. I will ask you if each of the following corporations did not also receive a discount under the contract for Sanitary cans purchased in the years 1936 through 1942 inclusive, the corporations in question being: Stokely Brothers & Company, Inc., Hawaiian Pineapple Company, Ltd., Libby, McNeill & Libby, Inc., Morgan Packing Company, and The Great Atlantic & Pacific Tea Company.

[fol. 266] A. You use the word "Sanitary," which I presume is the same as if you used the term "packers' cans." If that is correct then these companies did receive quantity discounts on their purchases in each of the years mentioned.

Q. Were those purchases arrived at by figuring the amount of Sanitary cans purchased as provided for in your contract?

A. Do you mean in our packers' cans contract?

Q. I mean in the form contract that was introduced in evidence after being produced by the attorney for the American Can Company, and in which contract I have not seen the words "packers' cans" used.

A. The purchases made by these companies under the packers' can contract were used in arriving at the amount of the discount, if any, to which each company was entitled.

Q. Now as a matter of fact you do not figure those discounts in your department, do you?

A. I do not.

Q. Therefore you have no personal knowledge as to how they are all figured, or what cans are included in those figures, do you?

A. Yes, I do. There is a statement attached to either the credit memorandum or the check as the case may be which we receive from the auditing department and which is forwarded to the customer through our department.

Mr. Fowler: I will call on you to produce those statements for the following corporations, and each of them, for the following years and each of them, to wit: California Packing Corporation, Stokely Brothers & Company, Inc., Hawaiian Pineapple Company, Ltd., Libby, McNeill & Libby, Inc., Morgan Packing Company, The Great Atlantic & [fol. 267] Pacific Tea Company, for the years 1936 through 1942 inclusive.

Mr. Allison: To which voice crying in the wilderness the plaintiff answers that it objects to the request for the reason that the information sought thereby is immaterial, irrelevant and improper to the issues formed and to be formed in this cause, or which may be formed in this cause.

Second, the information sought goes far beyond the scope of the issues herein.

Third, the information sought is that of a confidential nature between plaintiff and a customer other than the defendant, and can be solely for the information and immediate benefit of the defendant, without reference to the issues in this cause.

Fourth, the question is a continued reiteration of the same exploration heretofore conducted by the defendant

herein and to which the plaintiff has consistently interposed these objections.

The propriety of the request is certified to the Circuit Court for determination as to admissibility; and the plaintiff declines to furnish the information requested.

Q. Mr. Nugent, the ledger sheet or the equivalent bookkeeping record of each of your customers shows, does it not, the amount of discounts allowed that customer and also any allowances on account of claims made for damaged or defective cans or otherwise, as well as the payments made, does it not?

Mr. Allison: To which question the plaintiff objects for the reason that it is totally immaterial and irrelevant to the issues in this cause.

A. This is a question that would have to be answered by the bookkeeping department.

[fol. 268] Q. Do you state you do not know?

A. Yes, I do not know.

Q. Have you yet obtained the information as to whether or not your can plant at Austin, Indiana, manufactured the can known as the 2.02 by 3.12 during any of the period of time mentioned?

A. I am informed by the general manager's department that their record indicates that the Austin factory was not equipped to manufacture this can during the period.

Q. I will ask you if the American Can Company did not sell the 2.02 by 3.12 cans to the Morgan Packing Company at Austin, Indiana, in the years 1938, 1939, 1940, 1941, and 1942, and each of them.

Mr. Allison: The question is objected to because it is immaterial and irrelevant to the issues in the cause.

A. Do you want me to mention them by years?

Q. I want to know if you sold them each year.

Mr. Allison: Answer it by years if you want to.

The Witness: June 19, 1936, to December 31, 1936, none.

| | |
|---|---|
| 1937 | None |
| 1938 | None |
| 1939 | None |
| 1940 | Yes |
| 1941 | Yes |
| 1942 | No. |

I will ask you on those particular cans if the American Can Company did not equalize freight to Austin, Indiana.

A. Yes, sir.

Q. Where were these cans made by the American Can Company?

A. Indianapolis, Indiana.

[fol. 269] Mr. Fowler: The witness having produced a letter from Bruce's Juices by J. Adams Bruce, its president, to Mr. Len D. Jenkins, American Can Company, 230 Park Avenue, New York City, dated June 17, 1940, we now offer it in evidence, and we stipulate and agree that counsel may submit a copy thereof which shall be marked as the exhibit.

Copy of letter date June 17, 1940, from Bruce's Juices, Inc., to Mr. Len D. Jenkins, was marked Defendant's Exhibit No. 33; April 2, 1943, C. B. (which exhibit will be certified and presented to the Court under proper procedure.

Mr. Fowler: I am through with this witness at this time.

Cross-examination.

By Mr. Callahan:

Q. Mr. Nugent, I show you a booklet consisting of seven different sheets enclosed in the inside, heretofore marked Plaintiff's Exhibit 1 for identification which purports to show the price history of American Can Company, American Company Southern, listing sizes of cans used by Bruce's Juices, Inc., the defendant in this action, at various times from June 19, 1936, to December 31, 1942, with selling prices that would apply to such cans in all areas in continental United States, and ask you if you can identify this exhibit.

A. Yes, sir, this information was prepared under my direction by a man in the general sales department of American Can Company in New York, and the prices listed are for the cans of the various sizes as used by Bruce's Juices during the period from June 19, 1936, to December 31, 1942, all inclusive, and were in effect throughout the continental United States.

[fol. 270] Q. The information contained in Plaintiff's Exhibit 1 for identification was taken from the books and

records of the American Can Company kept in the regular course of business, is that correct?

A. Yes, sir.

Q. Mr. Nugent, I now ask you to examine the prices listed in Plaintiff's Exhibit 1 for identification and ask you to state on the record whether the prices that are shown in Exhibit 1 for identification were universally and uniformally charged by American Can Company to the customers within the areas noted.

A. Yes, sir, these prices were effective to all customers in the respective territories of the continental United States.

Mr. Callahan: The plaintiff intends to offer Plaintiff's Exhibit 1 for identification in evidence at the time of the formal hearing in this cause.

Mr. Fowler: I would like to ask some questions regarding it if I may be permitted to.

Mr. Callahan: I am not through yet. Do you want to ask me or the witness?

Mr. Fowler: I want to ask the witness, in reference to qualifying that exhibit for entry as an exhibit into evidence.

Mr. Callahan: May I point out on the record that Plaintiff's Exhibit 1 for identification was offered to the defendant and counsel for the defendant for use in introducing it in evidence if he saw fit. He did not see fit to introduce it in evidence or ask any questions about it.

Mr. Fowler: I will point out now and give notice now that unless I am permitted to examine the witness regarding this exhibit I will object to its introduction at the trial.

[fol. 271] Mr. Callahan: I am merely pointing out, Mr. Fowler, that the orderly procedure calls for the completion of the examination of one witness, as you well know. If you care to examine Mr. Nugent in rebuttal I have no objection.

Mr. Fowler: Then so as to not let that go, I ofttimes differ with you as to orderly procedure and the conduct of a trial, and I also say it is orderly procedure to examine a witness regarding an exhibit at the time it is produced and offered as such, and particularly when the witness is allowed to testify from such exhibit.

Mr. Callahan: The witness has merely identified the exhibit, as to what it stands for. If you wish to ask the witness, out of order, certain questions pertaining to his knowl-

edge of the exhibit, I have no objection, if you limit your line of interrogation to that line.

Mr. Fowler: I ask no favors. My examination is in orderly procedure and I have no desire to ask him anything out of order. I will point out that the witness did read from the exhibit, however.

Mr. Callahan: You may interrogate the witness on Plaintiff's Exhibit 1 if you wish at this time.

Redirect examination.

By Mr. Fowler:

Q. This Exhibit 1 for identification was prepared not by your department but by the bookkeeping or accounting department, was it not?

A. This exhibit was prepared under my direction by one of the men in the general sales department, packers' cans, in New York.

Q. It was prepared from the books and records kept by the bookkeeping or auditing department, was it not?

[fol. 272] A. It was prepared from records that we have in our department.

Q. That is the sales department?

A. Yes, sir.

Q. Now for the purpose of pointing out to you what we think may be errors, either in transcribing or otherwise, I will ask you a few questions. On the first page of Plaintiff's Exhibit 1 for identification I call your attention to the fact that there is nothing in the exhibit as far as I have seen which shows all purchases or contracts for the year 1936. Was that intentionally omitted, or am I wrong?

A. This page here is for 1936, from June 19th to December 31, 1936.

Q. I refer to the page which is marked March 24, 1943, which is in a different location in the copy you gave me than in the exhibit itself. I do not see on that page any record of 1936. Is that correct or am I wrong in that assumption?

A. There was no packers' can contract in effect with packers' can customers during the period from June 19, 1936, to December 31, 1936, inclusive.

Q. I note on the same page it refers to Bruce's Juices, and in parentheses it says "Southern" and then gives dates 1/1/37, to 12/31/40.

A. That was Bruce's Juices Florida contract at that time.

Q. The word "Southern" then is just the Florida contract?

A. The first contract mentioned is Bruce's Juices contract for Florida; the next two Bruce's Juices with American Can Company Southern, and the last one is Bruce's Juices in Florida.

Q. Then you have got Florida listed under both Southern and Eastern?

[fol. 273] A. One "Southern" should not be in there. The word "Southern" in parentheses should not be in there. That word refers to a district rather than to the customer.

Q. What do the other two "Southerns" refer to?

A. Those two referred to the contracts that we had with Bruce's Juices in the territory known by the American Can Company as the American Can Company Southern.

Q. You say that the word "Southern" in parentheses is wrong. What should it be?

A. That word should be deleted from that position.

Q. Should any other word be put in in lieu of it?

A. Just before the first item, where it says "from January 1, 1937, to December 31, 1940," the word "Eastern" should be in that position.

Q. It is hard to identify these pages, but under 1939 where it gives the size of the can, under note 5 at the bottom, where you say "1-1-39 $10.06," you do not give any weight of that tin plate. What was the weight of that tin plate?

A. I do not know what the weight of the tin plate was in that size; although I can find out from our records.

Q. I will ask you to furnish that information so that it will be complete.

Mr. Callahan: The answer is yes.

Q. Now turn over one page from the page you just testified regarding, where it gives the sizes, and in the year 1940——

A. Wait a second. I want to qualitfy this word plate. In the packers' can contract in that period from June 19, 1936, to December 31, 1941, in those contracts the weight of plate is not taken into consideration, in that we say in that contract——

[fol. 274] Mr. Fowler: I will put on the record that I have only been asking you a question which I believe I am en-

titled to ask, and that is to explain the exhibit itself, and I personally am not asking for this information, although I have no objection to it.

Mr. Callahan: Complete your answer.

The Witness: In that contract it says under "Specifications":

> "It is understood and agreed between the seller and buyer that all cans sold and delivered hereunder shall be manufactured from standard coke tin plate as serviceable as heretofore furnished by seller in the usual conduct of its business, or from tin plate of such other standard as may be from time to time imposed by government regulations."

So when the weight of plate, known as the gauge of plate, is reduced, the contract does not provide for a reduction in the price of cans, it is purely voluntary on our part, either increase or decrease in the weight of plate.

Q. Have you finished?

A. Yes.

Q. Now if you will turn over one page to the year 1940, the third item of 2.02 by 3.12, price $9.68, you do not there list the weight of the plate either. Do you know what that weight is, or do you wish to furnish it in this exhibit?

A. I do not think it necessary to mention the weight of plate, in view of my previous statement.

Q. Do you have any knowledge as to what that weight of plate was referred to in that exhibit, the weight of plate in that particular can?

A. I know the weight of the plate, yes.

[fol. 275] Q. What was it?

A. I am just a little bit confused. What is the last question?

Q. Maybe I can ask it over again. What was the weight of the plate of the cans shown in the third item, the cans being 2.02 by 3.12, price $9.68, in the year 1940?

A. It is my best belief and knowledge that it was 75 pound plate.

Q. On your items shown for 1941 and 1942 the price was the same as shown by this exhibit. Was the weight of the plate the same?

A. I am unable to answer definitely because I do not purchase the plate used. Although to my best belief and knowledge it was 75 pound plate.

Q. Now for those same three years the exhibit likewise shows the 2.02 by 3.14, the price in each year being $10.14, but no weight of plate given; what was the weight of plate of that can in each of those years?

A. I do not know. That is a question that would have to be answered by our can plate department.

Mr. Fowler: I am through examining as to this exhibit.

By Mr. Callahan:

Q. Mr. Nugent, there have been previously marked in this hearing as Defendant's Exhibits 2 through 28 inclusive certain forms of term contracts for Sanitary cans in use as identified by you, by the American Can Company, for the years involved in this suit? In each of these forms the basis upon which quantity discounts are allowed by American Can Company is stated, that is correct, is it not?

A. That is correct. I believe you intended to include the American Can Company Southern.

[fol. 276] Q. All within the group in your hand, marked as Defendant's Exhibits 2 through 28 inclusive.

A. Yes.

Q. Do you know, Mr. Nugent, if the quantity discounts specified in the forms of contract are universally allowed by American Can Company to all customers who qualify under quantity discount formula?

A. Yes, sir.

Q. They are universally allowed to all such customers?

A. They are universally allowed to all such customers.

Q. Who have purchased during this period of time under the Sanitary form of contract, is that correct?

A. That is correct.

Q. Are you familiar, Mr. Nugent, with the basis upon which the quantity discounts have been set up by American Can Company and the policies in connection with it?

A. In this type of packers' can contract?

Q. Yes.

A. Yes.

Q. Will you state for the record your knowledge with respect to the basis of the quantity discounts allowed by American Can Company?

A. On June 19, 1936, when the Robinson-Patman bill became a law the executives of the American Can Company, and also the general managers of sales, found that the con-

tract that we had been using and which was used up to and including June 18, 1936, contained a scale of discounts which we could no longer justify from the standpoint of the difference in selling costs under the Robinson-Patman Act. At that time or possibly the day following the execu- [fol. 277] tives of the American Can Company, the sales managers for the same company and the attorneys for the American Can Company sat down with the thought in mind of writing a contract that we could use under the terms of the Robinson-Patman Act.

I do not think it is necessary at this time to go into all details of this contract which was written at that time, and I might say which required a lot of time and a lot of thought by the various departments which I have mentioned of the American Can Company, but will confine my remarks to the quantity discount scale which appears in what we call the Robinson-Patman Bill contract.

It was necessary at the time of drafting this contract to make an estimate of the scale of discounts, the volume for each class—and I mean by class the one per cent, two per cent, three per cent, etc. brackets. We immediately set to work to try to find out if our guess——

Mr. Fowler: Excuse me just a moment. I want to interrupt just long enough to inject this objection to a discussion of the motives, the purposes and the opinions of the witness, together with a statement of the circumstances under which his contract was drawn, as being irrelevant and incompetent and purely self-serving, and having no bearing on the issues in this action, because what is at issue is what was done, not what the parties may have thought or desired.

Mr. Callahan: I wish counsel would reserve any further objections, if any, until the conclusion of the witness' answer.

Mr. Fowler: I will if I feel in fairness to my client I may.

Mr. Callahan: In view of the interruption, Mr. Nagent, would you care to have your last few statements read?

The Witness: Please.

[fol. 278] (Record read by the reporter.)

The Witness: We immediately set to work to try to find out if our opinion was correct, or if our estimate was correct.

As I have previously stated there was a lot of thought given to the scale, the estimated scale before it was put into

the contract. Men who sat in this meeting had been with the American Can Company for many years and knew a lot about sales costs and what was required to service certain customers—to serve certain customers. In taking the initial step of trying to find out if our estimate was correct we had issued—what I mean by "we", the American Can Company—a book of instructions, a copy of which was placed in the hands of each man in the company's organization who sold cans or rendered service from a sales standpoint to those customers.

The company went to a great deal of expense in its endeavor to set up this system of keeping sales cost; and it required a lot of time to get the system into operation; in fact it could not be put into operation—it was not possible to put it into operation until April 1, 1937.

At the end of the year of 1937 we had records of only the sales costs for the nine months from April 1, 1937, to December 31, 1937. Those figures indicated that we could approve the scale of discounts as established, and we continued keeping the time of the men calling on the various customers, the men in the sales force calling on the customers, and at the end of 1938 we found that the sales costs to the customers whose purchases were in the various brackets of the discount scale in the contract were such, when compared to costs of servicing customers below servicing those customers in the category below the first step in the discount scale, were justified. In keeping the time of the [fol. 279] men in the sales force, which includes salesmen and anyone else that called on a customer, we had various forms which were filled out and from which the sales costs were kept a record of.

We continued the system of keeping track of the costs of selling to the various customers for a number of years thereafter, or until we were very sure that our quantity discount scale was correct. The records of these costs are in the hands of the auditing department, who did the detail work, and people from that department could if so desired give the detailed figures.

Mr. Fowler: Is he through?

Q. Are you through with that answer?

A. I think that is as good a picture as I can paint without having it read over, because I tried to follow the continuity of it as well as possible.

Mr. Fowler: The defendant moves to strike the answer as being not the best evidence, as being incompetent, irrelevant and immaterial, and as a self-serving declaration, and stating the conclusion of the witness and the opinion of the witness.

Q. Mr. Nugent, all those matters to which you have just testified are within your own knowledge, are they not?

A. Yes, sir.

Q. You have referred in your testimony to a book of instructions issued to salesmen and others in connection with ascertaining the selling costs to the various customers, have you not?

A. Yes, sir.

Q. I show you a book entitled "Packer's Can Sales-Roadmen's Expense," and ask you if this is the book to which you referred in your testimony.

A. Yes, sir, this is the book to which I referred in my testimony.

[fol. 280] Mr. Callahan: I ask that this book identified by the witness be marked Plaintiff's Exhibit 2 for identification.

Book entitled "Packer's Can Sales-Roadmen's Expense" was marked Plaintiff's Exhibit No. 2 (which will be certified and presented to the court under proper procedure).

Q. Mr. Nugent, you also referred in your testimony to forms used by salesmen and others in keeping records of their time spent in selling customers. I show you a blank form marked Form 2310 in the upper left hand corner, entitled "Packers Can Sales—Monthly Distribution of Time," and ask you if this is one of the forms to which you referred in your testimony?

A. Yes, this is one of the forms to which I referred.

Mr. Callahan: I ask that this paper just identified by the witness be marked as Plaintiff's Exhibit No. 3 for identification.

Form 2310, headed "Packers Can Sales—Monthly Distribution of Time" was marked Plaintiff's Exhibit No. 3 for identification, April 2 (which will be certified and presented to the court under proper procedure).

Q. I now show you a blank form marked 2311 entitled "Report of Distribution of Hours—Packers Can Sales" and

ask you if this is another form referred to by you in your testimony.

A. Yes, sir, that is one of the forms that I referred to in my testimony.

Mr. Callahan: I ask that the paper just identified by the witness be marked as Plaintiff's Exhibit No. 4 for identification.

Form 2311, headed "Report of Distribution of Hours—Packers Can Sales" was marked Plaintiff's Exhibit No. 4 for identification, April 2, 1943, C. B. (which will be certified and presented to the court under proper procedure), . .

[fol. 281] Q. Mr. Nugent, is it your testimony that in computing the quantity discounts allowed by American Can Company such discounts are based upon savings in the cost of selling various customers?

Mr. Fowler: To which we object as leading, suggestive and putting the words of the answer into the mouth of the witness, who is an intelligent witness and quite able to make his own decisions as to what his testimony is and was.

Mr. Callahan: You may answer the question, Mr. Nugent.

Mr. Fowler: Sure, I have no way to stop him.

A. Yes, sir, that is correct.

Q. Mr. Nugent, in your direct examination by defendant's counsel you gave testimony with respect to the terms "Sanitary cans" and "packers' cans." Calling your attention now to Defendant's Exhibits 2 through 28 inclusive, being the forms of contracts for Sanitary cans, will you state for the record what types of cans were sold under those contracts?

A. What are known as round packers' cans, round Sanitary style packers' cans, with the exception of a few so-called asparagus cans, which are used on the Pacific Coast and are known as square cans, and a few oval fish cans which are not round but oval.

Q. Mr. Nugent, how many years have you been connected with the business of can manufacturing?

A. It will be 36 years the 30th day of this month.

Q. From your knowledge of the industry will you state what is meant by a packers' can?

A. A packers' can is a can that is usually referred to as a can used for a processed product, such as corn, peas,

tomatoes; string beans, fruits, peaches, pears, pineapple; they are those cans that are used mostly for perishable products and which must be sterlized for keeping purposes.

[fol. 282] Q. And are those the cans sold under the form of contract entitled "Term contract for Sanitary cans", with the exception of the asparagus can which your just testified about?

A. Yes, sir.

Q. I will ask you this, then, in computing discount allowances based upon quantity purchases according to the terms of the contract for cans sold on Sanitary can type of contract do you base the discount allowed on the gross sales of packers' cans sold under that contract?

Mr. Fowler: To which we object, because as I recall it the record will show that the witness said that he did not compute the discounts, that that was done by the auditing department.

Q. I will amend the question and ask you does the American Can Company to your knowledge?

The Witness: Would you mind reading that question again please?

(Question read by the reporter.)

A. We base the quantity discount on the net purchases of the cans sold under that contract.

Q. Mr. Nugent, in referring to Plaintiff's Exhibit 1 for identification containing the list of sizes of cans specified therein and the prices charged therefor during the period involved in this suit, will you state what type of can is meant by the list set forth in the exhibit?

A. The prices set forth in this exhibit are for plain coke Sanitary cans.

Mr. Callahan: Yesterday when Mr. Nugent testified on your examination he did not have available any shipments to Bruce's Juices, Inc. from June 19th to the end of that year, and he now has the figures.

[fol. 283] Mr. Fowler: I will adopt your statement.

Mr. Callahan: The record of American Can Company showing the dollar volume of business or sales to Bruce's Juices, Inc., for the period June 19th to December 31, 1936, packers' cans, amounting to $103,269.82.

If you want a breakdown we have it here.

Mr. Fowler: We do not need it. If you want it we have no objection. Are you through with the witness?

Mr. Callahan: Yes.

By Mr. Fowler:

Q. Mr. Nugent, referring to this Plaintiff's Exhibit No. 1 for identification, will you turn to 1938 as shown therein please?

A. Yes, sir.

Q. No weight of tin plate is shown there for those cans. What was the weight of tin plate for 2.02 by 3, 2.02 by 3.09, 2.02 by 3.12 and 2.02 by 3.14 for that year?

A. This record here does not show any 3.14 shipped in this year.

Q. I see.

A. Nor the first size mentioned.

Q. Well, it refers, Mr. Nugent, to the fact that it was quoted to Mr. Bruce. Will you state first then the weight of tin plate used in those first 3 types of can mentioned and the weight included and the price of the 3.14?

A. You mentioned three sizes. There were only two sizes actually shipped.

Q. That was 2.02 by 3.09 and 2.02 by 3.12?

A. Yes, sir.

Q. What is the weight of the tin plate on those sizes?

A. I do not have that information, and it would be necessary to obtain it from another department of the company.

[fol. 284] Q. Will you furnish it for the record?

A. Yes, sir.

Q. Now I ask you what was the price of the can known as 2.02 by 3.14 referred to as being quoted to Mr. Bruce in the note at the bottom, and tell me the weight of that tin plate.

A. What is the question?

Q. What tin plate is referred to in the notation where it says "Bruce decided to use in large quantities and prices quoted Bruce 11/17/38"?

A. I do not have that information.

Q. Will you furnish it?

A. Yes, sir.

Mr. Allison: Mr. Bonynge, the reporter, has suggested, and it is agreeable to the plaintiff, that if agreed by counsel it might make more intelligible and expedite the comple-

tion of the record if all the information to be furnished by this witness may be put in the form of a statement to be added at the close of the transcript, rather than trying to go back and insert it in each instance, which would delay the writing of the transcript in final form. We have no objection to that if it is agreeable to you.

Mr. Fowler: We have none either, providing of course that he furnished everything he has agreed to furnish throughout the record.

Mr. Allison: Also that Mr. Nugent and any other witness will sign the record in the presence of Mr. Bonynge when completed.

Mr. Fowler: Yes.

Q. There is one other question. I note on your exhibit marked for identification Plaintiff's Exhibit No. 1 under the year 1939 there is some adjustment in price and a different weight of tin plate therein indicated. Was there any [fol. 285] difference in the cost to the American Can Company for the different weight of tin plate, and is that what is indicated by this exhibit?

A. I am unable to answer that because the sales department does not figure the cost.

Q. Then do you know whether or not there was or was not any saving in reduction in the weight of the tin plate?

A. Those were voluntary reductions by the American Can Company as referred to there.

Q. Then you do not know whether or not there was any saving to the American Can Company by reducing the weight of the tin plate?

A. I do not.

Mr. Fowler: That is all at this time.

Mr. Callahan: I would like to make a statement on the record if you do not mind.

Mr. Fowler: All right.

Mr. Callahan: During the course of Mr. Nugent's examination several question were asked of him with respect to dealings between American Can Company and certain of its customers, eight in number. The questions were objected to on the ground, among others, that answering them would divulge confidential business communications. The American Can Company did not feel that it was in a position to divulge such information without the permission of such customers. For the information of counsel for defendant,

I wish to state for the record that the company has in the meantime communicated with such customers and has received permission from three of such customers to divulge that information, namely, Engleman Gardens, Border Packing Corporation and Taormino Corporation. The Company stands reading and willing to give such information, in view of such permission granted by such customers.

[fol. 286] Mr. Fowler: This offer is accepted and we are glad to get this information; I think we are entitled to it. It is interesting here to note, however, that the corporations in what we contend to be the larger group, to wit, the Morgan Packing Company, the California Packing Corporation and Stokely Brothers & Company, and one or two others, are not included, and we would urge the American Can Company to seek to get this permission that they may voluntary permit us to examine those records also, as we think they are more important to the issues here at stake.

Mr. Callahan: Mr. Fowler, for your information, the identical form of request went to each company by telegraph. I have given you the names of those companies who are willing to have us release such information. In making this offer to produce such information we do not concede, however, the materiality or relevancy of any of the matters contained therein.

Mr. Fowler: May I ask you when you made this request of these customers?

Mr. Callahan: I do not mind answering that question. The request was made by telegraph this morning. Telegrams were sent from this office of the American Can Company this morning.

Mr. Fowler: It makes it rather difficult now to go back and take up the loose ends of what was asked, but I will endeavor to do so.

Mr. Callahan: The suggestion offered by the plaintiff is that upon completion of the transcript of the testimony an examination be made thereof and that the information requested by defendant on its examination with respect to the three corporations just named be furnished by American Can Company and added to the transcript as a supplement.

[fol. 287] Mr. Fowler: This will not be satisfactory as doing away with my objection to the instruction of counsel to witness not to answer the question, because from the answers which I would have received I could have pursued

my line of investigation further, and if I follow the procedure now suggested by counsel I am not given that opportunity. With the proviso that if after obtaining that information I wish to pursue it further we may return for that purpose, I will accept it in that form. Otherwise, I will endeavor to simply go back and go over the matter with the witness fully as to each one of these accounts.

Mr. Callahan: That suggestion is agreeable to the plaintiff.

Mr. Fowler: Very well. In view of the stipulation of counsel as contained in the record just above, I will not pursue the line of questioning of the witness, considering the disruption of my investigation and to conserve time.

Q. Mr. Nugent, do any of the customers of the American Can Company that have been enumerated here to you repeatedly, rent any warehouse space or are they paid for the matter of warehouse space by the American Can Company?

The Witness: Let me have the question.

(Question read by the reporter.)

Mr. Callahan: Where is that in your notice of examination, Mr. Fowler?

Mr. Fowler: I do not know.

Mr. Callahan: I will have to limit you to your notice.

Mr. Fowler: You can make your objections or instruct the witness, counsellor.

Mr. Callahan: The question is objected to as immaterial, [fol. 288] irrelevant and improper and specifically as not coming within the scope of the notice for examination pursuant to which this deposition is being conducted. If the witness is able to answer the question at this time he may.

The Witness: Rent is a very broad term and I cannot quite understand what is meant by the question.

Q. Does the American Can Company pay, either in cash or by other methods, for the use of any warehouse space furnished or purported to be furnished by any of the customers of the American Can Company which have heretofore been repeatedly enumerated to you.

Mr. Callahan: If he knows.

A. I do not know; I would have to check that. The question is put in such form that I cannot get just what is in-

tended. I imagine that where we store cans with a customer we in a way lease the premises for a dollar a year, which is to make it legal. Now, beyond that I do not know what is meant by rental of a warehouse.

Q. Do you lease any warehouse space from California Packing Corporation?

A. I will have to answer that I do not know.

Q. Will you get that information and furnish it?

A. Yes.

Mr. Allison: All of these questions are limited to packers' cans, I take it?

Mr. Fowler: No. I do not know what basis they used to pay them.

Q. I will ask if you will get that information regarding Stokely Brothers & Company, Inc., Hawaiian Pineapple Company, Ltd., Morgan Packing Company, The Great Atlantic & Pacific Tea Company, and each of them.

A. Well, packers' cans only?

Q. No, sir.

[fol. 289] A. I cannot answer the question then.

Q. Can you answer the question for packers' cans?

A. I can answer the question for packers' cans.

Q. Will you give us the information for the period of time or any part thereof under investigation and discussion here?

A. I think our records will show that information.

Q. Will you also show how much is paid for the space and where rented or leased?

Mr. Callahan: The witness is instructed not to furnish such information, as being totally and completely immaterial and irrelevant to the issues here involved.

Mr. Fowler: That is all for this witness at this time. I now ask you to produce a witness——

Mr. Allison: May we excuse Mr. Nugent?

Mr. Fowler: Yes, surely.

Mr. Callahan: You want another witness?

Mr. Fowler: Yes, I would like to start so we can see where we are.

Mr. Callahan: Whom do you want?

Mr. Fowler: If you ask me whom I want I will ask for your comptroller, Mr. Anderson.

Mr. Callahan: Mr. Anderson is not the comptroller of the company.

Mr. Fowler: Mr. Wardell.

Mr. Callahan: I do not know whether he is here at this time.

Mr. Fowler: Or if he has an assistant who is familiar with the books and records of the corporation perhaps he would do.

Mr. Callahan: What would be the general nature of your line of inquiry?

[fol. 290] Mr. Allison: Then we could get the right man.

Mr. Fowler: My line of inquiry is to ask what the invoices and records of the corporation show as regards these customers in question.

Mr. Callahan: I will get you the assistant comptroller, Mr. George Madge. With the permission of counsel I would like to have sworn Mr. Ong, the auditor of the company.

Mr. Fowler: I would be glad to accommodate you.

I, Allen Herbert Nugent, having read the foregoing transcript of my deposition taken on April 1 and 2, 1943, am about to subscribe my name and swear to the same, but before doing so desire to make the following supplementary statements with respect to the pages of the transcript shown below:

*Page 9* (P. 137 of this record)

"American Can Company is licensed to do business in twenty-five separate states of the country and the Territory of Hawaii. Of the plants and factories shown on Defendant's Exhibit No. 1, the following are not operating at the present time:

23-A Essex, New Jersey
26-A Trenton, New Jersey
37-A Savannah, Georgia
50-A Richmond, Virginia
51-A Atlanta, Georgia
52-A Newport, Tennessee
53-A Cleveland, Ohio
63-A Detroit, Michigan
96-A United (San Francisco, California)."

*Page 11, lines 1-13* (P. 139, lines 7-19 of this record)

"Bruce's Juices had two types of contracts in the territory east of the Rocky Mountains—one to cover their

Florida operations and the other to cover their Texas operations."

[fol. 291] *Page 13, lines 6-12* (P. 140, last paragraph)

"Packers Cans are those sizes of round, sanitary cans from the smallest diameter up to and including the full gallon size, the latter having dimensions of 6 3/16" x 8 12/16"; they are generally used for processed products such as peas, corn, tomatoes, string beans, fruits of various kinds, also fruit and vegetable juices. There are some larger cans used for certain juices which are known as General Line cans—for instance, the 5-gallon square can."

*Page 18, next to last line* (P. 144, 5th line this record)
The word "gross" should be deleted in view of the table of purchases on page 19.

*Page 19* (P. 144 of this record)
The following changes should be made in the table for the year 1940; "Gross, $369, 129.65; Net $361,949.02."

*Page 20, lines 4-5* (P. 145, lines 4-5 of this record)

"American Can Company first sold individual juice cans to W. B. Haggerty, Inc. of Tampa, Florida, in the Spring of 1936."

*Page 21, last line* (P. 146, lines 17-18 of this record)

"Border Packing Company of Brownsville, Texas, first purchased cans from us in 1937 and continued purchasing them through to the end of 1942."

*Page 27, lines 16-17* (P. 150, lines 23-24 of this record)

"American Can Company sold Bruce's Juices, Inc., 202 diameter cans for shipment to Genesco, New York, in the years 1938 and 1939."

*Page 31, line 11* (P. 153, line 17 of this record)
The word "district" should be "districts."

*Page 35, line 8* (P. 156, line 13 of this record)
The phrase "at the time" should be "at this time."

*Page 36, line 13-14* (P. 157, lines 13, 14 of this record)

"Only during the seasons of 1938-1939 and 1939-1940 we [fol. 292] sold them the 202 x 312 can. In 1940 on account

of reorganization the name was changed to Engelman Products Company."

*Page 36, last line* (P. 157, line 23 of this record)

The word "had" should be "packed."

*Page 40* (P. 160, lines 19-21 of this record)

The answer to the last question on this page should be deleted and the following inserted in its place: "I did not call on the Border Packing Company at any time when they were canning juice in the 202 diameter can."

*Page 42* (P. 161; lines 9, 10 of this record)

The 5th and 6th lines from bottom of page should be deleted and the following inserted in their place: "Casual observation of the record I have before me indicates not more than 1%."

*Page 43* (P. 162, line 2 of this record)

The 6th line from bottom of page should be deleted and the following inserted in its place: "I understand there was an operation going on."

*Page 43* (P. 162, lines 5 & 6 of this record)

The 3rd and 4th lines from bottom of page should be deleted and the following inserted in their place: "Not after they started negotiations with Vincennes or with whomever they had them."

*Page 44* (P. 162, lines 8, 9, 10 of this record)

The first answer at top of page should be deleted and the following inserted in its place: "I say after Bruce's Juices started their negotiations with Vincennes and their supplier of cans I do not know."

*Page 61* (P. 175, lines 17-20 of this record)

The last answer should be deleted and the following inserted: "I will have to say that as previously stated we do not add the purchases of General Line cans of these cus- [fol. 293] tomers to their Packers Can purchases in figuring the quantity discount."

*Page 62* (P. 176, line 7 of this record).

Line 13 should be deleted and the following inserted in its place: "by the instructions or policies issued by the company."

*Page 63* (P. 177, line 10 of this record).

In the next to last line delete the words "all their plants."

*Page 67* (P. 179, lines 25-26 of this record).

The first answer should be deleted and the following inserted in its place: "I do not know. I was not familiar with his duties before he became General Manager of Sales of General Line cans."

*Page 67,* sixth line from bottom (P. 180, line 13 of this record).

"The following is a list of the plants operated by California Packing Corporation where packers cans are used for the canning of fruit and vegetable juices and the symbols of the factories of American Can Company from which the cans were shipped:

| Location of Plant | Factory Symbol |
|---|---|
| No. 11 Sacramento, Cal. | 91-A, 97-A |
| No. 37 Fruitvale, Cal. | 99-A, 97-A, 96-A |
| No. 29 Honolulu, T. H. | 39-A |
| No. 20 Santa Ana, Cal. (1936 and 1937) | 98-A |
| No. 3 San José, Cal. (1937 only) | 97-A |
| Tampa, Florida | 44-A, 41-A |
| Evona, Utah (1936 and 1939-1942, inc.) | 60-A, 4-A |

*Page 75, line 12* (P. 186, line 7 of this record).

The word "it" should be deleted and the words "our business" inserted in its place.

*Page 77, line 8* (P. 187, line 18 of this record).

The word "computed" should be "completed."

[fol. 294] *Page 77, line 11*: (P. 187, line 23 of this record).

The word "one" should be deleted and the words "particular individual" inserted in its place.

*Page 80, line 14* (P. 190, line 2 of this record).

This line should be deleted and the following inserted in its place: "They buy cans but their orders do not specify that."

*Page 85, lines 6-7* (P. 193, line 8, 9 of this record).

"The following is a list showing the location of plants operated by California Packing Corporation and the packers cans of like grade and quality and competitive with those sold to Bruce's Juices, Inc. during the period June 19, 1936, to December 31, 1942:

| Location of plant | Sizes of Cans |
|---|---|
| Sacramento, California | 211 x 414 |
| | 307 x 409 |
| | 603 x 700 |
| Fruitvale, California | 211 x 414 |
| | 307 x 409 |
| | 404 x 700 |
| | 603 x 700 |
| Honolulu, T. H. | 211 x 414 |
| | 307 x 409 |
| | 404 x 700 |
| | 603 x 700 |
| Santa Ana, California | 211 x 414 |
| San Jose, California | 211 x 414 |
| Tampa, Florida | 307 x 409 |
| | 502 x 510 |
| | 211 x 414 |
| | 300 x 407 |
| | 404 x 700 |
| Evona, Utah | 404 x 700" |

*Page 86* (P. 193, last answer of this record).

The first answer should be deleted and the following inserted in its place: "I have supervision over those men who are in charge of the Adjustment Departments of our company. When a complaint is presented by a customer, [fol. 295] it goes to one of these Adjustment Departments and when that department has obtained all the evidence and from it recommends the claim be paid, the file is brought to my office by the head of the Adjustment Department in New York, and if I agree with the recommendation the claim is approved by me for payment."

*Page 88, line 1* (P. 195, line 9 of this record).

Delete the word "taking" and insert in its place the word "computes."

*Page 89* (P. 196 last answer of this record).

The last answer should be deleted and the following inserted in its place: "If there is a competitor located nearby and we know that competitor is making the can, and if we are able to determine whether his price is the same as ours at that point, then we would *be* in some cases equalize the freight on such size."

*Page 90, lines 13-14* (P. 197, lines 5, 6 of this record).

Delete these lines and insert in their place the following: "There is not a big change if it is only in the height of the can."

*Page 91, lines 1-10* (P. 197, lines 15-23 of this record).

Delete these lines and insert in their place the following: "We have certain types of body makers on which we can manufacture certain diameter cans, for instance, from a 202 diameter up to and including the 404 diameter. In changing from one height can to another where we have the diameter change parts, the expense is nominal, but when it is necessary to make a new diameter the cost of building the change parts is very large."

*Page 91, lines 17-22* (P. 198, lines 2-6 of this record).

Delete these lines and insert in their place the following: "If it was a new height of can and the diameter change parts were available we could make it on one of the lines I have mentioned, but there would be some outlay of money for the height change parts."

[fol. 296] *Page 159, 3rd line from bottom* (P. 239, line 7 of this record).

The word "their" should be deleted and the word "the" inserted in its place.

*Page 162, lines 9-15* (P. 240 last answer, of this record).

These lines should be deleted and the following inserted in their place: "That price would be through the year 1938. In 1939 the price to Engelman Gardens was $10.06 M. from January 1 to September 28.

At that time it was changed to $10.00 M., but we made a voluntary reduction at the same time of 32¢ M. because of having changed from 85 lb. to 75 lb. plate".

*Page 163, line 12* (P. 241, lines 15, 16, this record).

The word "Edenboro" should be "Edinburg", and similarly in the next line.

*Page 166, line 1* (P. 243, line 11, this record).

The word "treated" should be deleted and the word "credited" inserted in its place.

*Page 170, line 4.*

The word "sent" should be deleted and the word "send" inserted in its place.

*Page 172, line 13* (P. 247, line 6th from bottom, this record).

The word "purchases" should be deleted and the word "cases" inserted in its place.

*Page 173, lines 12-13* (P. 248, lines 14, 15, this record).

These lines should be deleted and the following inserted in their place: "American Can Company Southern, a wholly owned subsidiary of American Can Company, during the years 1938, 1939 and 1940 sold cartons to Engelman Gardens Association, and during the years 1941 and 1942 sold cartons to Engelman Products Company."

Pages 165-176 (P. 250, lines 2-6, this record).

"In compliance with the request made by counsel for Defendant at the bottom of page 175 and top of page 176, the following is a list showing the names of the customers [fol. 297] requested by counsel for defendant; opposite each of the names of said customers in the amount of all claims paid to them with respect to cans which were competitive with and of a like grade and quality to those purchased by the defendant in this action from June 19, 1936, to December 31, 1942:

| | 1936 | 1937 | 1938 | 1939 | 1940 | 1941 | 1942 |
|---|---|---|---|---|---|---|---|
| Engelman Gardens | — | — | — | — | — | — | — |
| Morgan Packing Co. | — | — | — | — | — | — | — |
| Hawaiian Pineapple Company | — | — | — | — | — | — | — |
| Libby McNeill & Libby | $1,759.51 | — | — | $774.38 | 488.30 | $5,937.12 | — |
| California Packing Corp. | — | 384.61 | $5,201.31 | — | — | — | 80.97 |
| Border Packing Co. | — | — | — | — | — | — | — |
| Great Atlantic & Pacific Tea Co. | — | — | 5,923.80 | 8,000.00 | — | — | — |
| Stokely Bros. Inc. | — | — | — | 22,035.54 | 21,687.36 | 450.00 | — |
| Taormina Corp. | — | — | — | — | — | — | — |

*Page 189, lines 14-15* (P. 259, lines 2, 3 of this record):

These lines should be deleted and the following inserted in their place: "The following named corporations were sold 202 x 312 cans starting at the dates set opposite their respective names:

Border Packing Corporation, February 5, 1940.
Libby, McNeill & Libby, June 20, 1941.
Morgan Packing Company, September 7, 1940.

[fol. 298] These sales were made at a uniform price of $9.68 per thousand cans on a $5 tin plate basis to each of the above named companies."

*Page 195, lines 13-14* (P. 262, last answer of this record).

These lines should be deleted and the following inserted in their place: "Sales of cans to California Packing Corporation from January 1, 1936, to June 18, 1936, were not added to sales for the period June 19 to December 31, 1936, in order to arrive at the quantity discount rate."

*Page 203, line 3* (P. 268, line 6 of this record).

The word "managers" should be deleted and the word "manufacturing" inserted in its place.

*Pages 210-211* (P. 273; lines 19 and 20 of this record).

The last line on Page 210 and the first line on Page 211 should be deleted and the following inserted in their place: "The weight of plate used for the 202 x 312 can on January 1, 1939, was 85-lb. body stock and 80-lb. end stock."

*Page 227, line 5* (P. 284, line 2 of this record).

This line should be deleted and the following inserted in its place: "During the year 1938 85-lb. tinplate was used for the bodies and 85-lb. tinplate was used for the ends of the 202 x 309 and 202 312 cans, with the exception that at Indianapolis we used 80-lb. body stock and 85-lb. end stock for the 202 x 309 can."

Allen Herbert Nugent.

Subscribed and sworn to before me this 14 day of June, 1943. Clarence Bonynge, Notary Public, New York County. New York County Clerk's No. 237. Commission expires Mar. 30, 1945.

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[fol. 299] IN THE CIRCUIT COURT, HILLSBOROUGH COUNTY, FLORIDA, 13TH JUDICIAL CIRCUIT

No. 23454—Law. Civil Action. Damages $50,000

AMERICAN CAN COMPANY, a New Jersey Corporation, Plaintiff,

vs.

BRUCE'S JUICES, INC., a Florida Corporation, Defendant

STATE OF NEW YORK,
County of New York, ss:

I, Clarence Bonynge, a Notary Public of the State of New York, duly commissioned and authorized to administer

oaths, hereby certify that Allen Herbert Nugent, the witness whose testimony was taken pursuant to notice dated February 25th 1943 was duly sworn by me to tell the truth, the whole truth and nothing but the truth in the above captioned action, and that the foregoing pages 6 to 236-N, both inclusive, are a true record of the testimony given by the said Allen Herbert Nugent.

I further certify that the said witness after having read his testimony signed the same and swore to the correctness of it before me.

I further certify that I am not a relative or employee or attorney or counsel of any of the parties or a relative or employee of such attorney or counsel and that I am not financially interested in the action.

Witness my hand and seal at New York City, this 14 day of June 1943.

Clarence Bonynge.

Clarence Bonynge, Notary Public, New York County. New York County Clerk's No. 257. Commission expires Mar. 30, 1945.

[fol. 300] WILLIAM B. ONG, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Callahan:

Q. Mr. Ong, will you state your position with the American Can Company, please?

A. Auditor.

Q. How long have you held that position?

A. About one year.

Q. And prior to that what was your position with the company?

A. Assistant auditor.

Q. You know, do you not, that for certain times between 1937 and 1941 records were kept by the company of expenses with respect to roadmen and salesmen?

A. I do.

Q. For what purpose were those records kept?

A. To determine the amount of selling expense of different classes of customers, selling different types of customers.

Q. I show you five separate sheets which purport to show a summary of such expenses and ask you if you can identify these sheets.

A. Yes, I can.

Q. How do you identify them, as what?

A. They are records and statements that we compiled at the close of these years 1937 to 1941 inclusive.

Q. Were these records compiled under your general supervision?

A. Under my general supervision, and for a part of that time under Mr. Carpenter's.

[fol. 301] Q. Do you know of your own knowledge that these records were made or the sheets prepared from records kept by the American Company in the regular course of business?

A. Yes, sir.

Mr. Callahan: I ask that the five sheets be marked as plaintiff exhibits for identification numbers 5, 6, 7, 8, and 9.

Schedule headed "Packers' Can Sales—Roadmen's Expense, April to December Inclusive—1937" was marked Plaintiff's Exhibit No. 5 for identification, April 2nd, 1943, C. B. (which exhibits will be certified and presented to the court under proper procedure).

Schedule headed "Packers' Can Sales—Roadmen's Expense January to December inclusive 1938" was marked Plaintiff's Exhibit No. 6 for identification, April 2nd, 1943, C. B. (which exhibits will be certified and presented to the court under proper procedure).

Schedule headed "Packers' Can Sales—Roadmen's Expense January to December Inclusive—1939" was marked Plaintiff's Exhibit No. 7 for identification, April 2nd, 1943, C. B. (which exhibits will be certified and presented to the court under proper procedure).

Schedule headed "Packers' Can Sales—Roadmen's Expense January to December Inclusive—1940" was marked Plaintiff's Exhibit No. 8 for identification, April 2nd, 1943, C. B. (which exhibits will be certified and presented to the court under proper procedure).

Schedule headed "Packers' Can Sales—Roadmen's Expense January to December Inclusive—1941" was marked Plaintiff's Exhibit No. 9 for identification,

April 2nd, 1943, C. B. (which exhibit will be certified and presented to the court under proper procedure).

[fol. 302] Mr. Callahan: At this time plaintiff wishes to state that at a subsequent time in this proceeding in a more formal hearing the plaintiff intends to offer the exhibits just presented for identification into evidence.

Mr. Fowler: At which time defendant will object to the offer of the exhibits in evidence because they are not the best evidence.

Q. Mr. Ong, in your capacity as auditor of the company and in your former capacity as assistant auditor have you been familiar with the methods employed by the company in analyzing selling customers' accounts for the purpose of arriving at quantity discounts for such customers?

A. Yes.

Q. I now show you five separate sheets which purport to show the packers' can selling expense and an analysis of selling customers receiving quantity discounts for the nine months ending December, 1937, for the twelve months ending December, 1938, for the twelve months ending December, 1939, for the twelve months ending December, 1940, and for the twelve months ending December, 1941, and ask you if you can identify these papers.

A. Yes, I can identify them.

Q. Will you state what they are, please?

A. These are statements showing the sales to the customers who received discounts, with the saving in selling expense compared with the customers that did not receive discounts, and the amount of discount paid.

Q. Were these sheets prepared under your general supervision?

A. They were.

Q. Do you know whether these sheets have been prepared [fol. 303] from records kept by the American Can Company in the regular course of business?

A. They were.

Q. Do the figures shown on these sheets correctly set forth the figures shown on the books and records of the company?

A. On the books and records?

Q. Yes.

A. Yes, they do.

Mr. Callahan: I ask that these five sheets be marked as Plaintiff exhibits for identification in their order (all of which exhibits will be certified and presented to court under proper procedure).

Schedule headed "Packers' Can Selling Expense Analysis of Selling Customers Receiving Quantity Discounts Nine Months Ending December, 1937", was marked Plaintiff's Exhibit No. 10 for identification, April 2nd, 1943, C. B.

Schedule headed "Packers' Can Selling Expense Analysis of Selling Customers Receiving Quantity Discounts Twelve Months Ending December, 1938", was marked Plaintiff's Exhibit No. 11 for identification, April 2nd, 1943, C. B.

Schedule headed "Packers' Can Selling Expense Analysis of Selling Customers Receiving Quantity Discounts Twelve Months Ending December, 1939" was marked Plaintiff's Exhibit No. 12 for identification, April 2nd, 1943, C. B.

[fol. 304] Schedule headed "Packers' Can Selling Expense Analysis of Selling Customers Receiving Quantity Discounts Twelve Months Ending December, 1940", was marked Plaintiff's Exhibit No. 13 for identification, April 2nd, 1943, C. B.

Schedule headed "Packers' Can Selling Expense Analysis of Selling Customers Receiving Quantity Discounts Twelve Months Ending December, 1941," was marked Plaintiff's Exhibit No. 14 for identification, April 2nd, 1943, C. B.

Mr. Callahan: That is all at this time.

Mr. Fowler: At the times these exhibits marked for identification, including the last group and the other ones presented during the testimony of Mr. Ong, are offered defendant will object upon the ground that the exhibits themselves are incompetent, irrelevant and immaterial, and that they state only the conclusion of the witness as to what the records show; they are not the best evidence; they do not show how the costs are computed; the defendant has had no opportunity to examine the exhibits, they not having been offered in evidence; and the plaintiff during this

entire proceeding having refused to permit us to obtain information regarding the accounts of the principal customers of the American Can Company who compete with Bruce's Juices and who are according to our contention the principal customers among the group repeatedly referred to herein, and particularly I will mention the California [fol. 305] Packing Corporation, Stokely Brothers & Company, Inc., Hawaiian Pineapple Company, Ltd., Libby, McNeill & Libby, Inc., Morgan Packing Company and The Great Atlantic & Pacific Tea Company; and further that only a few moments ago, after almost two days hearing, it was stated that certain information would be given us regarding the accounts of Engelman Gardens, Border Packing Company and Taormino Corporation, which according to the information and contention of the defendant are the smaller purchasers among the group of customers enumerated.

Cross-examination.

By Mr. Fowler:

Q. Mr. Ong, it is a matter of fact, is it not, that the amount of purchases during the time from June 19, 1936, and through 1942 of California Packing Corporation, Stokely Brothers & Company, Inc., Hawaiian Pineapple Company, Ltd., Libby, McNeill & Libby, Inc., Morgan Packing Company, The Great Atlantic & Pacific Tea Company, and each of them, greatly exceeded the amount of business, that is cans sold to Engelman Gardens, Edenboro, Texas, Border Packing Company, Brownsville, Texas, and Taormino Corporation?

Q. I do.

Mr. Callahan: Do you understand the question, Mr. Ong?

Mr. Fowler: Let me state in the record here that this is a most intelligent witness and that I do not think he needs to be directed, coached, assisted, led or suggested to by counsel, and that if he does not understand the question he can ask me to clarify it, which I will be most happy to do.

Mr. Allison: I do not think he is — mind reader though.

Mr. Fowler: Read the question to the gentleman, please.

(Question read by the reporter.)

A. In general I would say so. I do not recall the amount of sales to these last three. We would have to look back [fol. 306] on our records to determine what they were. I do not remember all of them by name.

Q. Don't you know as a matter of fact that the business from each of those corporations as named did greatly exceed the purchases by the other group of corporations named?

A. I will say this, that the California Packing Corporation, Stokely Brothers & Company, Inc., Hawaiian Pineapple Company, Morgan Packing Company and The Great Atlantic & Pacific Tea Company were some of our largest customers.

Q. Now, Engelman Gardens and the Border Packing Company and Taormino Corporation were some of your smaller customers, were they not?

A. I don't so particularly remember those; I remember the larger ones.

Q. But you do remember the larger ones?

A. Not all of them by name.

Q. Bruce's Juices, Inc. was not considered one of your larger customers either, was it?

A. Not as large as California Packing Corporation and Libby, McNeill & Libby and Hawaiian Pineapple Company.

Q. Now you state that these exhibits were made up from the records of your corporation?

Mr. Fowler: They have not been presented to me and I won't look at them.

Mr. Callahan: You may look at them.

Mr. Fowler: Counsel for plaintiff gives counsel for defendant the right to look at the exhibits which have been marked for identification.

Q. Is that right?

A. That is right.

[fol. 307] Q. You have in your records here and on your books the detailed information from which you make your deduction as to the cost of selling to various customers, is that correct?

A. That is correct.

Q. Those original records are right here in this office are they not?

A. That is right.

Q. Will your corporation permit us to have an auditor check your records to verify these figures?

Mr. Callahan: Do not answer that question, please, Mr. Ong. In answer to defendant's counsel's last question, the company is not in a position and will object to the examination of records of any of those corporations except as such permission is granted to us by the corporations involved.

Mr. Fowler: If you will repeat the question to the gentleman I do not believe it encompasses the answer that counsel made.

(Question read by the reporter.)

Mr. Callahan: I instruct the witness not to answer the question, and make the statement on behalf of the plaintiff which I have made.

Q. These figures are the ones that you contend show your sales costs, is that correct?

A. The two statements together show the sales costs.

Q. Of the American Can Company?

A. Of Packers' can selling expense.

Q. And how the overhead cost is apportioned between the packers' cans selling cost and the selling of other cans too, does it not?

The Witness: Repeat that question, please.

[fol. 308] (Question read by the reporter.)

A. I do not quite understand that.

Q. All right, sir, I will ask it in another way. In other words these figures you state that your records indicate are your selling cost of packers' cans, is that right?

A. That is right.

Q. That required an apportioning of cost, particularly in regard to some of your overhead items, between the selling of packers' cans and other cans which your corporation sells, is not that right?

A. Yes, only I would not say about that overhead expense, because we split each kind of expense by itself and did not apply overhead on it.

Q. I note on some of these items you have salaries; do you remember offhand whether any salaries are included under that item?

A. No, I could not say that I remember offhand the salaries that are included in there.

Q. Do you know what traveling expenses are included in here, of what individuals?

A. There are many of them.

Q. You do not know, do you, without looking at the original records?

A. That is right.

Q. Now is not that true of each of these items listed here in all of these exhibits that you have identified?

A. How is that again?

Q. Is not that true, that you do not know what they are except by going and checking and seeing what is included under each one of these heads as shown in your original records?

[fol. 309] A. I know the items of the general nature that are included here; as to the specific items, each man's traveling expenses or salary, I could not recall at this time.

Q. You could not tell how many people or what they did included in this traveling expense at this time, could you?

A. I could not recall how many men there were.

Q. Nor what those particular men's duties were?

A. In a general way I knew it was in connection with selling packers' cans.

Q. Let me ask you this question, Mr. Ong. How long have you been with the American Can Company?

A. Since 1909.

Q. What is referred to by your corporation as Sanitary cans?

Mr. Callahan: Is not the record replete with information on that by a man more competent to give it than this witness? I object to it as entirely repetitious.

Mr. Fowler: I think the gentleman is quite able.

The Witness: What is the question now?

Q. In your contracts you refer to Sanitary cans. What are Sanitary cans?

A. Sanitary cans are cans that are used for the packing of food products, both side seams of which are soldered, and the ends are closed by double seam or closing machine.

Q. Are fish canned in Sanitary cans?

A. Some.

Q. What is the difference between Sanitary cans and packers' cans, if any?

A. The packers' can classification also includes the hole and cap milk cans.

Q. The packers' can does?

[fol. 310] A. The packers' can specification.

Q. Does the Sanitary can include milk cans?

A. How is that again?

Q. Does the Sanitary can, that term, include milk cans?

A. Not generally.

Q. But sometimes?

A. I think that the people in the sales department can answer that better than I can.

Q. Then you do not know?

A. I am not positive.

Q. I notice on one of the exhibits, I believe it is marked for identification as number 10, you say customers received 5 per cent discount on $19,764,135.37. What does that mean?

A. That is the sales to those customers for the period of nine months of 1937.

Q. Then these figures on your exhibit for identification number 10 are for a nine months' period only?

A. For 1937 there is the note here as to where our nine months' figures and where our twelve months' figures are, that is the first sheet for 1937 only. The rest are for the twelve months' period.

Q. The next line says "Quantity discount customers $48,859,969.05." What does that mean?

A. That is the sales for nine months of all the customers who received these discounts.

Q. Then adding the two items together, or some $60,000,000, is the total amount of customers receiving discount shown here?

A. No.

Q. What is it?

[fol. 311] A. The forty-eight millions includes the nineteen millions.

Q. What were your total sales for that nine months' period?

Mr. Callahan: You are speaking of packers' cans now?

Mr. Fowler: I am speaking of the type of cans that were used in arriving at these figures in this exhibit.

A. I do not know at this time.

Q. You do not know?

A. No.

Q. Do you know how many customers, the total amount of the purchases of the customers who did not receive discounts?

A. It is in the records, but I do not know offhand.

Q. Will you produce that figure for us?

Mr. Callahan: That question is objected to as immaterial, incompetent and improper and not within the scope of this examination or the issues involved in this suit.

The witness is instructed not to answer the question, and the propriety of the question is certified to the Circuit Court for ruling.

Q. Now, did you personally take the figures from the books and make the breakdown of the various items from which these exhibits were compiled?

A. No, sir.

Q. You do not for example personally know how these items were assembled, from which these details are produced?

A. Which are you talking about, the little sheets or the large ones?

Q. I am talking about the little sheets at the moment.

A. Your question is what?

Q. You do not personally know the details of the figures from which these totals were produced?

[Vol. 312] A. I do not know the details?

Q. Yes, sir. Do you not understand the question, sir?

A. I do not quite understand what you mean by it.

Q. I will try again. For example in your second column here it says "Percentage of selling expense to sales for customers receiving no quantity discounts." Do you know the details of the items that go to make up what they call those percentages of selling expense to sales?

A. It is on these sheets here.

Q. Are these little sheets here then nothing but the compilation from the larger sheets?

A. They are the result from those sheets, reduced to percentage on these small sheets.

Q. Then the small sheets are nothing but the reduction to percentage of the items on the larger sheets?

A. Practically so.

Q. What else is there?

A. Then there is the extension made in the fourth column, and the discounts paid in the last column, which are not on the large sheets.

Q. Now do you know what is included, turning to the large sheet, Exhibit 5, the first large sheet, where it states in the third item listed as "miscellaneous," do you know what is included in miscellaneous of your own knowledge?

A. Well, that is miscellaneous office expense, which includes carfares. If we turn to the card of accounts we can get the items enumerated.

Q. But you have not that information now? They are on your original records, are they not?

[fol. 313] A. And they are also in our booklet of accounting, as to just exactly what items are included in the classification of expenses; they are specifically enumerated.

Q. Now "auto depreciation (salesmen's cars)" do you know how many salesmen's cars are listed in those items and to whom they sold cans and what territory they covered in any of those items?

A. I do not know the number of cars and who they were assigned to, but it is on our records and it can be obtained.

Mr. Fowler: I believe a while ago you instructed the witness not to agree to let us examine the records of your corporation to get that detailed information, is that correct, Mr. Callahan?

Mr. Callahan: Automobiles you are talking about now?

Mr. Fowler: As to the total amounts listed here.

Mr. Callahan: I do not know that that question was asked.

Mr. Fowler: Yes, sir.

(Discussion off the record.)

Mr. Fowler: I will ask you, sir, if you will permit our auditors to examine your records to get the details of how these figures shown in these exhibits from No. 5 to and through No. 14 have been obtained, and the details regarding each of those items.

Mr. Callahan: The plaintiff will make the records of the company available to the defendant's auditors for the purpose of examining the details listed in Exhibits 5 to 9 for identification.

Mr. Fowler: All right, we will arrange the details on that. Are you likewise willing to let us examine the information

necessary so that we may check and get our own information and opinion regarding the correctness of the figures contained in Exhibits 10 through 14?

[fol. 314] Mr. Callahan: With respect to the request of the defendant the exhibits referred — were prepared by the witness who is now on the stand and is able to testify about them.

Mr. Fowler: I understand that. I repeat the question.

Mr. Callahan: The question has no meaning to me.

Mr. Fowler: The witness then can answer the question or not.

Mr. Callahan: In so far as an examination of Exhibits 10 to 14 is concerned the company will permit an examination of its records in so far as we are permitted to do so by customers of this corporation.

Mr. Fowler: Naturally that would be of no value to us. If it is so restricted we cannot obtain the information. In other words it is our contention that that proviso is equivalent to a declining to permit us to do so.

Mr. Callahan: In view of the position taken by counsel it is my judgment that the question be certified to the Circuit Court for determination as to its propriety, and the witness is instructed not to answer.

Q. What bookkeeping system do you use in the American Can Company?

A. Do you mean whether we have hand-written books or machine books, is that it?

(Discussion off the record.)

Q. Will you now answer the question fully so as to save my asking another question?

A. Part of our records are kept on machine posting and part are kept by hand posting, and all our general books are in hand posting.

[fol. 315] Mr. Fowler: With the new development here it is going to take us some time. Do you want to go on in the morning?

(Discussion off the record.)

Mr. Allison: At this point the plaintiff offers in evidence the several exhibits heretofore offered and marked for identification, from 1 to 14 inclusive.

Mr. Fowler: To which exhibits and each of them the defendant objects because they are incompetent, irrelevant and immaterial, they are conclusions of the representatives of the American Can Company; the figures in their books, the details of which have not been produced, the items that make up the various figures, have not been shown, the defendant has not had an opportunity to examine the records of the corporation; and it is now 5:30 in the afternoon of the second day, and we will not have that opportunity and the free access to the books of the corporation to examine them has not been given, and the exhibits are not the best evidence and do not give sufficient facts on which a court can decide whether or not the figures properly portray what they purport to portray in said exhibits.

The documents heretofore marked Plaintiff's Exhibits Nos. 1 to 14 for identification, were marked Plaintiff' Exhibits Nos. 1 to 14, April 2nd, 1943. C. B. (which exhibits will be certified and presented to the Court under proper procedure).

By Mr. Callahan:

Q. May I ask you, Mr. Ong, at this time whether Plaintiff's Exhibits 1 to 14 inclusive accurately reflect the records of the American Can Company?

A. They do.

[fol. 316] By Mr. Fowler:

Q. I note here that in Exhibit 10 it shows customers receiving 5 per cent discounts to be $19,764,135.37. How many customers are included in that figure?

Mr. Callahan: If you know.

A. Two or three.

Q. Do you know which?

Mr. Callahan: Do not answer that question. The witness is instructed not to answer that question.

Q. If a customer purchases $2,999,000 of net money value of cans you state in here, in your contract, that you allow him 2 per cent, that is right, is it not?

Mr. Callahan: It does not state that, Mr. Fowler, and you know it.

Mr. Fowler: It is included in that figure.

Q. He would be entitled to 2 per cent under this contract? That is right, is it not? $2,999,000 he would be entitled to 2 per cent, that is right, is it not?

A. That is right.

Q. While if he should buy an additional $1,000, so that the net money value of his purchases of cans was $3,000,000, he would get a discount of 3 per cent on his total purchases, would he not?

A. If his purchases for that year were only $3,000,000 he would be entitled to 3 per cent.

Q. Now, as a matter of fact the matter of discount to which one purchaser might be entitled based on actual saving in percentage of selling expenses would vary from another according to the facts and circumstances in each case, would it not?

[fol. 317] A. The customer is entitled to the discount as provided for in this contract, based on his purchases.

Q. I am now speaking only of actual savings to the American Can Company of quantity sales, not to the discount which you give. In other words if one customer should come into either a plant or a main office and order $3,000,000 worth of cans to be delivered in a given year, that not requiring the calling upon him by salesman or anything of that nature, and no traveling expense and no conventions, no samples, no telephone and telegraph messages, none of these other items mentioned, that would be a greater saving than if you had to make a larger number of calls through your salesmen on that purchaser at some far distant point, would it not?

Mr. Callahan: The question is objected to as argumentative in its entirety. I submit that the question answered by the witness, the previous answer to the question by the witness, is sufficient. Answer it if you are able to. Do you understand the question, Mr. Ong?

A. On the example in question our selling expense to that man would be less than to the other man.

Q. In other words the actual saving in expense depends upon where your salesmen have to go, how often they have to go, and a good many of those other items as contained in your exhibit 5 and the similar exhibits, is not that correct?

A. The saving depends on many things.

Q. And one of those things is the location of the customer, the types of sales organization it has, how many times the salesmen have to go, and such items as that, is not that true?

A. As I said before, it consists of many things?

Q. Well, is that correct?

[fol. 318] Mr. Callahan: He has answered the question.

Q. If in a given town one man purchases all of his supply of cans, while there is also in that town a plant, being one of many, of another customer, and all of the purchases are made through one plant—by the one man who has only one plant, for a thousand cans wouldn't it be cheaper to sell him than to have to make trips to all the various plants of the other customers.

Mr. Callahan: I object to that question as argumentative and calling for the conclusion of the witness. I submit further that the witness has answered this whole line of inquiry by the answers previously given.

Mr. Fowler: What do you want him to do, answer it or not? Do you want to instruct him on it?

Mr. Callahan: No.

Mr. Fowler: Go ahead and answer it then.

The Witness: Now, will you read the question for me?

(Question read by the reporter.)

Q. In other words——

Mr. Callahan: Are you withdrawing that question?

Mr. Fowler: I am clarifying it.

Q. In other words as to what the actual savings in cost are depends on each separate customer and transaction, is not that correct?

A. I do not know as I can say any more than I said before, that the saving depends on so many things, and there are many things that enter into the saving.

Q. And these savings that you have shown in these exhibits are your opinion of the savings on these quantity discounts?

A. How is that again?

[fol. 319] Q. And these percentages savings as shown in these exhibits here are based upon your opinion upon the savings in quantity discounts?

Mr. Callahan: I object to the form of that question. If you want to use some other word than the "opinion" I will withdraw my objection.

Mr. Fowler: I do not want to use any other word.

The Witness: What is the question now?

(Question read by the reporter.)

A. They are calculated from the records kept in this connection.

Q. And you selected from those records the items which in your opinion would be saved on quantity discounts, is that correct?

A. No, we did not select anything, we took the whole record.

Q. Well, who decided that you would put in, for example, contributions and dues, did you decide that?

A. No, because that is the policy of where that expense went, the classification that it has always been distributed to, and it is the general practice in distributing our expense.

Q. Then that is a policy you have of distributing your over-head expense?

A. That is right.

Q. And that is likewise true of such items as laboratory assistance?

A. That is right.

Q. You do not personally know on what basis your convention expenses are distributed, do you?

A. Yes.

[fol. 320] Q. Well, what percentage is distributed to packers' cans and what percentage is distributed to other types of cans that you sell?

A. They are kept mostly according to the class of convention, that is if we hold conventions that deal with packers' can business it all went to packers' can expense; and there were other conventions which only had to do with general line packages, all of which went to general line expense.

Q. Turning to our Exhibit 5, which is your first large sheet, am I right in concluding that this shows that in the months of April to November you had $16,000 of convention expenses?

A. $18,619.

Q. Now, who did you say decided that they would put those expenses in as an item here in this exhibit? Did you decide that?

A. No, the convention expense has always been distributed in our selling expense, as part of our selling expense.

Q. This exhibit also does not show how you divided these items of expense between the American Can Company and any of its subsidiaries, does it?

A. It is altogether in the statement.

Mr. Fowler: Gentlemen, I intend to ask this witness and likewise perhaps supplement the information which I seek to obtain from this witness by the evidence of Mr. George Madge, assistant comptroller of the American Can Company, now in this room, questions in substance as follows: to produce the invoices for the sale of cans to each of the corporations enumerated repeatedly in these proceedings for each year covered by this investigation, including the part of the year 1936; to produce the ledger sheets showing the amount of total charges made to each of these [fol. 321] customers for each separate year—and when I say each year hereafter it will be intended to mean from June 19, 1936, to the end of that year as being included in one of those years—which ledger sheet or other record shows the total charges for cans made against each of these corporations, the amount of cash payments and the amount of discounts and allowances and credits which make up the difference between the cash payments and the total amount of such charges; and if allowances and discounts and credits other than cash are disclosed, to investigate the details thereof.

Mr. Allison: It is further informally understood that should the foregoing questions be propounded to the named witnesses, or to any officers or employees of the plaintiff, called by defendant, the plaintiff would object to such questions, except as to the following corporations, to wit: Border Packing Corporation, Engelman Products Company and Tormino Corporation, for the reason that the same are immaterial and irrelevant to the issues and possible issues in this cause, that the same are beyond the scope of the order of court, and that the same constitutes a fishing expedition into the records of the plaintiff in support of its pleas, which effort goes beyond the purview of the

statute sought to be invoked thereby, and seeks to make available to the defendant for his information and benefit confidential business relations with competitor customers of the plaintiff.

And the plaintiff announces that it would and will instruct any and all witnesses to decline to answer the foregoing questions as to the five corporations, other than the three above named, and certifies the question to the Circuit Court for determination as to its propriety and admissibility.

[fol. 322] Mr. Fowler: Inasmuch as it is the defendant's contention that the five corporations, whose records we will not under the instruction of counsel for the plaintiff be permitted to see, are the principal customers listed, and inasmuch as counsel does not feel it worth while to do a vain and useless thing, he will not interrogate further, and will join with counsel for the plaintiff in this one item, and that is certifying the question to the court, without precedent or prejudice.

I think, gentlemen, as far as I am concerned that concludes it; you won't tell us, and we will go home.

Subscribed & sworn to before me this 14 Day of June 1943. William B. Ong, Clarence Bonynge, Notary Public, New York County, New York County Clerk's No. 237. Commission expires March 30, 1945.

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[fol. 323] In the Circuit Court, Hillsborough County, Florida, 13th Judicial Circuit

No. 23454—Law

American Can Company, a New Jersey corporation, Plaintiff,

vs.

Bruce's Juices, Inc., a Florida corporation, Defendant

Civil Action, Damages $50,000

State of New York, County of New York, ss:

I, Clarence Bonynge, a Notary Public of the State of New York, duly commissioned and authorized to administer

oaths, hereby certify that William B. Ong, the witness whose testimony was taken pursuant to notice dated February 25, 1943, was duly sworn by me to tell the truth, the whole truth and nothing but the truth in the above captioned action, and that the foregoing pages 237 to 267, both inclusive, are a true record of the testimony given by the said William B. Ong.

I further certify that the said witness after having read his testimony signed the same and swore to the correctness of it before me.

I further certify that I am not a relative or employee or attorney or counsel of any of the parties or a relative or employee of such attorney or counsel and that I am not financially interested in the action.

Witness my hand and seal at New York City, this 14 day of June 1943.

Clarence Bonynge, Notary Public, New York County
New York County Clerk's No. 237. Commission expires Mar. 30, 1945. (Seal.)

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[fol. 324] In Circuit Court of Hillsborough County

Depositions of witnesses taken pursuant to notice of taking testimony pursuant to pre-trial conference order dated January 22, 1943, at the office of American Can Company, 230 Park Avenue, New York City, on July 22nd and 23rd, 1943.

Appearances: John M. Allison, Esq., Attorney for plaintiff; Morgan J. Callahan, Esq., of counsel. Cody Fowler, Esq., Attorney for defendant.

Henry L. Snyder, called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Allison:

Q. Please state your name.

A. Henry L. Snyder.

Q. What is your occupation, Mr. Snyder?

A. I am the bills receivable clerk in the treasurer's office of the company, directly responsible to the treasurer, R. A. Burger.

Q. When you refer to the company, which company do you mean?

A. The American Can Company.

Q. You are in the New York office of the company?

A. That is right.

Q. When you refer to bill receivable, does that encompass notes receivable?

A. Yes, notes receivable.

[fol. 325] Q. How long have you been in that position?

A. Approximately 13 years.

Q. That is, continuously last past?

A. That is right.

Q. Where do you live, Mr. Snyder?

A. Baldwin, Long Island.

Q. I hand you Plaintiff's Exhibits A-1, B-1 and D-1 for identification and ask you if you are familiar with those exhibits.

A. Yes, sir.

Q. Have they at any time been in your possession?

A. They have.

Q. Did they come to you in your capacity just described?

A. They did.

Q. Do you have any letters or memoranda in your possession which you received at the time you received these exhibits?

A. I have a letter dated February 26, 1942, written by Bruce's Juices, Incorporated, to the American Can Company, attention of Mr. Geier, in which two of these notes were included.

Q. This letter was referred to you by Mr. Geier?

A. That is correct, yes, sir.

Q. And what accompanied this letter?

A. These two notes.

Q. Refer to them by number.

A. Referred to as Exhibit B-1 and Exhibit D-1.

Q. Do you recall whether that letter reached you on or about the date it bears, allowing time for transmission in the mail?

A. Yes, approximately at that time.

Mr. Allison: The plaintiff offers in evidence the letter just produced by the witness.

[fol. 326] It is stipulated between counsel that a true copy of the letter just identified and filed as Plaintiff's

Exhibit 1 may be substituted for the original of such letter, which is a part of the permanent files of the plaintiff.

Letter dated February 26, 1942, from Bruce Juices, Incorporated, to American Can Company, was marked Plaintiff's Exhibit No. 1, 7-22-43, R. W. P.

Q. Now, Mr. Snyder, do you have any memoranda referring to Plaintiff's Exhibit A-1?

A. I have a copy of a letter from our Mr. Slayton of our Tampa office to Bruce's Juices, Incorporated, dated April 10, 1942, referring to the $12,000 note.

Q. Does that letter have accompanying it any other memorandum?

A. No.

Mr. Allison: The plaintiff offers in evidence to be marked Plaintiff's Exhibit 2 letter dated April 10, 1942, produced by the witness and to be marked Plaintiff's Exhibit 3, letter dated April 14, 1942, produced by the witness.

Mr. Fowler: We have no objection to either of these letters or copies of letters.

It is agreed between counsel that true copies of these exhibits may be substituted, as the originals are part of the plaintiff's permanent files.

The letters dated respectively April 10, 1942, and April 14, 1942, were marked Plaintiff's Exhibits Nos. 2 and 3, 7-22-43, R. W. P.

[fol. 327] Q. Mr. Snyder, do payments received on account of bills and notes receivable pass through your hands?

A. Yes, all of them.

Q. These Exhibits A-1, B-1 and D-1 are owned by whom, if you know?

A. They are owned by the American Can Company.

Q. How much is due upon those three notes?

Mr. Fowler: Wait. You have not the notes in evidence yet.

(Discussion off the record.)

Mr. Allison: Plaintiff now offers in evidence Plaintiff's Exhibits A-1, B-1 and D-1 respectively, which were heretofore on February 15, 1943, identified by the defendant

and filed for identification before the Hon. L. L. Parks, Judge of the above-styled court.

Mr. Fowler: To which three notes the defendant objects as being incompetent, irrelevant and immaterial.

The three notes were marked Plaintiff's Exhibits Nos. 4, 5 and 6, 7-22-43, R. W. P. (Included at pages 121, 123 and 127 respectively of this record).

Q. Mr. Snyder, have you computed the amount due upon Plaintiff's Exhibits 4, 5 and 6?

Mr. Fowler: As I understand the question, it is, has he computed the interest?

Mr. Allison: Yes, and the principal he has already testified to.

Mr. Fowler: You ask him to compute the principal of the notes plus the interest, as called for in the exhibits?

Mr. Allison: Right.

A. I have figured the interest on these three notes. The note marked Plaintiff's Exhibit 4, for $12,000, the face amount of that note is unpaid, and in addition there is interest owed to today amounting to $790.

[fol. 328] Q. From what date is that interest computed?

A. That interest is computed from March 30, 1942, which is the date of the note.

Q. At the interest rate provided on the face of the note, what is the daily amount of interest accruing each day?

A. $1.67, and the rate of interest is five per cent.

Now, Exhibit 5, that note is for the amount of $19,799.97. The entire amount of the principal is unpaid, and in addition there is owed interest to today from May 25, 1942, amounting to $1,149.50. The interest per day on the face amount of this note at the rate of five per cent amounts to $2.75.

Exhibit 6, note for the amount of $7,039.25, the face amount of that note is unpaid and the amount of interest to today is $408.65.

Q. From what date?

A. From May 25, 1942. The interest per day at the rate of five per cent on the face amount of that note amounts to 98 cents.

Mr. Allison: You may inquire of the witness.

Cross-examination.

By Mr. Fowler:

Q. These notes represented evidence of the purchase price of cans, did they not, Mr. Snyder?

A. I am unable to say whether the entire amount of the notes represented the purchase price of cans, because on some occasions a note might have been taken for machinery or rental. I don't know that that would be the ordinary procedure, but I am not in a position to say definitely that the entire amounts of these notes covered can purchases.

Q. Would you say that the major part of the notes represented can purchases?

[fol. 329] A. So far as I know, that is correct.

Q. You represent the American Can Company. Cannot you tell us whether it does or does not represent can purchases?

A. Yes, I could to this entent: I know that they represent an indebtedness to the company. At times the American Can Company issues invoices for rentals and for machinery and there could be occasions when a note would be given to us by a customer to cover such charges, but I cannot say at present whether these notes cover cans in their entirety.

Q. Well, you are in charge of the records on that point, are you not?

A. Yes, sir; I could verify it.

Q. Will you tell us whether or not any of that indebtedness represented by those notes was not for can purchases?

A. I would have to look that up.

Q. In other words, to make it simple for you, if any of those purchases are not for cans will you so inform us?

A. I will do so.

Q. How long will it take you to get that information?

A. It should not take very long, a matter of perhaps an hour.

Q. All right. Then if we are going to be up here at least another day, can you give us that information before we leave?

A. I can, yes, sir.

Q. Exhibit 4, which is a note for $12,000, was this the first note evidence of this particular indebtedness?

Mr. Allison: Do you understand the question?

The Witness: I do not understand the question. The first note in evidence, do you mean?

Q. Is this a renewal note or is this the note that was first [fol. 330] given to evidence this indebtedness? Does that make my question clear?

A. Yes. That is an original note.

Q. Not a renewal note?

A. No, pardon me, that is not right. That note which is dated March 30, 1942, is not an original note. It was a renewal of a previous note.

Q. When was that previous note given?

A. The original note was dated October 1, 1941.

Q. And was that original note dated October 1, 1941?

A. Yes.

Q. And is this a renewal of the first note given?

A. That original note matured on December 30, 1941, and was renewed by another note of the same date for the same amount which matured on March 30, 1942. The note of March 30, 1942, renewed the note which I said matured on March 30, 1942.

Mr. Allison: The two notes referred to by the witness have been heretofore filed for identification as Plaintiff's Exhibits A-2 and A-3.

Q. Now, Exhibit No. 5, Mr. Snyder, which is the note dated February 23, 1942, that note was the original note given?

A. There were two notes dated February 23, 1942.

Q. I refer for the moment only to the one marked Exhibit 5, which is in the principal sum of $19,799.97.

A. That note is not the original note. That note does not represent the original indebtedness. It renewed a previous note. That note renewed a note which was due February 23, 1942, dated November 24, 1941, which in turn renewed a previous note for a like amount that was dated [fol. 331] August 26, 1941. That note in turn renewed a note for the same amount dated May 28, 1941. That note renewed a note for the same amount dated February 27, 1941, which note also renewed a note for the amount of $27,184.60 in part, dated November 29, 1940. There had been a payment of $7,384.63 credited on that note.

Q. Do you know whether or not that was a cash payment or some other credit?

A. Due to the type of endorsement which I put on the note I am led to believe it is a credit, because it was credited December 31, 1940, $7,384.63.

Q. So in your opinion that represents cash paid by Bruce's Juices to the American Can Company?

A. No, it looks to me from the nature of that endorsement as though that was a credit, not cash. However, that question I should like to refer to the records for before testifying. I will furnish the information during the hearing. But that note in turn renewed a note which was dated August 31, 1940, for $27,184.60.

Q. And it in turn was a renewal, was it not?

A. That was a renewal of a previous note. Now that note renewed a part of a note for $102,184.60, which note was dated March 1, 1940, and was for the face amount of $107,784.60.

Q. Do your records indicate when your company actually received that note?

A. The note for $107,784.60?

Q. No. As I understand, you stated that the note that was renewed on the date you have given in March was a renewal of a larger note previously given.

A. Yes.

Q. And I ask you whether this smaller note which you refer to as representing part of the indebtedness repre-[fol. 332] sented by the renewal note—do your records indicate when you actually received that note?

A. Yes, they do.

Q. When did you receive that?

A. The actual day that we received that note would have to be determined by referring to our journal, and it does not show on the note itself. We received the note a few days after its date.

Q. What is the note you are talking about now?

A. This note for $27,184.60, dated August 31, 1940.

Q. Now the note of which this represented a part, when was that note dated and when was it due?

A. That represented a part of a note which was dated March 1, 1940, for $107,784.60, which was due April 15, 1940, and had been reduced to a balance of $102,184.60. The balance of that note had been renewed by a note for the amount of——

Q. Just a moment. What was the date of this large note you have just described?

A. March 1, 1940, $107,784.60.

Q. And this Plaintiff's Exhibit 5 represents a renewal of part of that note? I mean this note which you have identified for us.

A. Yes. There is an intervening note which comes in between those two which I was about to describe.

Q. All right.

A. This note for $27,184.60 renewed in part a note for the amount of $100,784.60, which note is dated June 14, 1940. That note renewed a note for $107,784.60, which was due June 14, 1940, and was dated April 15, 1940.

Q. Do your records indicate when you received that note that you have just described?

A. They do indicate it.

[fol. 333] Q. When did you receive that note?

A. I would have to look at the journal. There is time intervening between the date of the note and the date that we enter it, and I could not give the definite date without looking at the record.

Q. Will you give us that information?

A. I should be glad to furnish that evidence.

Q. According to the way we understood you, you refer to a note for some $100,000 renewing a note for $107,000. Will you explain that again?

A. Yes. There was a note dated March 1, 1940, for $107,784.60, which was due April 15, 1940. There were three payments made on that note amounting to $5,600, which reduced the note to $102,184.60.

Q. You have no note of $100,000, and the note you refer to was for $102,000?

A. No, I have no note for $102,184.60. I have a note for $100,784.60. There was a difference of $1400 which was included in a note dated August 31, 1940, for $27,184.60.

Q. Have you any explanation of that, sir?

A. Yes. The reason for it I don't know.

Q. Just what was done?

A. I know what notes we got and the amount that they represented.

Q. You had no personal contact with Bruce's Juices or Mr. Bruce yourself?

A. I did not.

Q. And you had nothing to do with the correspondence between the parties?

A. I did not.

Q. Now that last note you referred to of $107,000, when was that dated?

[fol. 334] A. That was the note for $197,784.60, dated March 1, 1940.

Q. And that was renewed when?

A. That matured April 15, 1940.

Q. And was renewed?

A. Not in full. There was $5600 paid on it.

Q. Can you tell us whether that was paid in cash or whether or not it was a credit?

A. That was paid in cash.

Q. Now that note in turn was not an original note but a renewal note, was it?

A. That was a renewal note of several other notes, which in turn were each renewals of still other notes which go back to 1939. In fact, one of them goes back as far as September 19, 1938.

Q. Which one goes back to September 1938?

A. I would like to correct that. The oldest note goes back to that date in 1939.

Q. Then, Mrs Snyder, all of the indebtedness referred to goes back to what date in 1939 that you mentioned a few moments ago?

A. Various dates. August 4th, June 2nd—I am giving the dates of the original notes—July 28th, July 21st, August 18th, August 11th and June 9, 1939.

Q. Then all of the indebtedness represented by Plaintiff's Exhibit 5 has gone back to 1939?

A. Yes.

Q. Now, referring to Plaintiff's Exhibit 6, which is a note payable to the order of the American Can Company Southern, are you also an officer of the American Can Company Southern?

A. I am not an officer of the American Can Company Southern, but I have the same position with the American [fol. 335] Can Company Southern as I have with the American Can Company.

Q. And Mr. Burger does also?

A. Mr. Burger does also, that is correct.

Q. You keep all their records here?

A. I keep all of their records.

Q. Here in New York City?

A. Here in New York City.

Q. In the same office?

A. Same office.

Q. Will you please trace the history of the renewals of Plaintiff's Exhibit 6, the same being a note dated February 23, 1942, in the principal amount of $7,039.25, payable to the American Can Company Southern?

A. That note renewed a note for a like amount dated November 24, 1941, due February 23, 1942, which note renewed a note for a like amount dated August 26, 1941, due November 24, 1941. That note renewed another one for a like amount dated May 28, 1941, due August 26, 1941, which renewed a note for a like amount dated February 27, 1941, due May 28, 1941. That note renewed a note for the same amount dated November 29, 1940, due February 27, 1941. That note renewed another for the same amount dated August 31, 1940, due November 29, 1940. That note renewed in part a note dated June 14, 1940, due August 31, 1940, for the amount of $7,057.05. There had been credited as of May 24, 1940, an amount of $17.80 on that note. The note just described in the amount of $7,057.05 due August 30, 1940, and dated June 14, 1940, renewed another note for $7,057.05 that was due June 14, 1940, and was dated April 15, 1940. That note renewed a note for $7,057.05 dated March 1, 1940, and due April 15, 1940. The note which was [fol. 336] dated March 1, 1940, for $7,057.05 renewed two notes, one of which is dated November 18, 1939, and is for $1518.29, due February 16, 1940, and the other is dated January 22, 1940, and is for the amount of $5,538.76, and is due March 1, 1940.

Q. Now, Mr. Snyder, how far back does the indebtedness to which you have been referring go?

A. It goes back to May 26, 1939.

Q. Mr. Snyder, because your records do not agree with ours during a certain short period in this time and owing to the nature of the testimony which is so easy to become confused, I would like to ask you please refer to Exhibit 5 again, which is the note in the sum of -19,799.97 dated February 3, 1942, payable to the American Can Company, and ask you with reference to the notes which this note renewed in whole or in part to begin with the renewal note date March 1, 1940, in the sum of $107,000 and trace that indebtedness as evidenced by notes forward.

A. There is a note dated March 1, 1940, for $107,784.60, due April 15, 1940, which note was renewed by one for a like

amount dated April 15, 1940, due June 14, 1940. And on the note due June 14, 1940, we received payments totalling $5600 which reduced the amount of the note to $102,184.60. To cover the amount of $102,184.60, we received a note dated June 14, 1940, for $100,784.60, which note matured August 31, 1940. That left a balance of $1400 on the note which was due June 14, 1940.

Q. What became of that note?

A. The one dated June 14, 1940?

Q. No, the one due 9-14-40.

A. There is a note due August 31, 1940 for $100,784.60. Is that the one referred to?

[fol. 337] Q. What are the full particulars regarding the note dated June 14, 1940?

A. That is a note for $100,784.60.

Q. When was that due?

A. August 31, 1940, and was carried over to September 3rd.

Q. Will you take that note issued June 14th and look at the note itself and see when it was due?

A. Due August 31, 1940.

Q. May I look at it?

A. That is a photostatic copy of it (handing paper).

Q. Do you know whether or not this is an amended note, whether there was first a note dated June 14, 1940, given in another amount, but in that vicinity, and whether or not this was an amended note?

A. I do not know. That is the only note that we took into our records and I have no recollection of having seen another note.

Now let us go back to the note due June 14, 1940, for $107,784.60, which, as I said, was renewed in part by a note dated June 14, 1940, due August 31, 1940, for $106,784.60. The balance of the note due June 14, 1940, $1400, was included in a note dated August 31, 1940, for the amount of $27,184.60, which was due November 29, 1940.

Q. What became of the other balance?

A. The other balance of the $102,000 note?

Q. Yes.

A. That was represented by a note dated August 31, 1940, for $75,000, due December 31, 1941.

Q. Do your records indicate when the company received that note in the amount of $75,000, dated August 31, 1940?

[fol. 338] Mr. Allison: Just a moment. Plaintiff will have to object to that because counsel for the defendant declined to go into that $75,000 note at the suggestion of counsel for plaintiff, and therefore that is not in cross examination of anything brought out on direct. I again offer for convenience to withdraw that objection if agreeable to counsel and allow this witness to identify the $75,000 note in the same fashion as he has identified Exhibit 4, 5 and 6.

Q. In view of counsel's objection I withdraw my question and ask you when you received the note for $27,000 which was dated August 31, 1940, and to which you have already testified.

A. I shall have to refer to our journal covering our notes received in order to tell you the date on which that note was presented, and I will do that later in this hearing.

Mr. Fowler: That is all, Mr. Snyder. When you return with the information which you are going to get for us there may be a few questions then if after consultation with Mr. Bruce we think there are any discrepancies in our respective records.

(Discussion off the record.)

Mr. Allison: In view of the fact that photostatic copies of plaintiff's Exhibits 4, 5 and 6 are already in this record attached to the deposition of Mr. J. Adams Bruce dated February 15, 1943, by consent of defendant's counsel the original exhibits 4, 5 and 6 will not be included with the record of this transcript but will be retained by the plaintiff for introduction at the trial.

Mr. Fowler: That is all right.

Redirect examination.

By Mr. Allison:

Q. Mr. Snyder, you have testified on cross examination concerning a number of notes by the defendant which were renewed in varying amounts from time to time.

[fol. 339] A. Yes.

Q. Do you have those original notes which you have referred to, and if not, what disposition was made of them?

A. I do not have them in my file at present. I gave those original notes to you on February 2, 1943.

Q. And that was all the notes to which you referred in your testimony?

A. That is right, that is all of the notes to which I referred in my testimony.

Q. As these notes were renewed they were not surrendered to Mr. Bruce?

A. No, they were not, because——

Mr. Fowler: I object to any voluntary statement. He has answered the question.

Q. Why were they not surrendered, if you know of your own knowledge?

Mr. Fowler: To which we object becaues the witness has stated that he was only the custodian of the records and did not know anything about conferences or correspondence and that he never saw Mr. Bruce and therefore is not qualified to give his opinion as to why these notes were or were not returned, and the testimony is not the best evidence, and therefore improper.

A. The notes were not surrendered because the original notes had affixed to them Florida State documentary stamps and we knew that if we kept the original notes attached to later notes the Florida documentary stamps which were affixed to the originals would cover the later notes and there would not be any necessity for the maker of the notes buying additional documentary stamps, and to the best of my knowledge that was the reason for retaining the original and subsequent notes.

[fol. 340] (Discussion off the record.)

By Mr. Fowler:

Q. That is your opinion as to why you kept all the notes?

A. That was the definite reason for keeping them. I am sure that is the reason for it.

Henry L. Snyder.

Subscribed and sworn to before me this 6th day of August, 1943. Rowland W. Phillips, Notary Public, Nassau County 1291. N. Y. Co. Clk. No. 432. Commission Expires March 30, 1944.

Recess taken to 2 P. M.

After Recess

R. M. Roberts, called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Allison:

Q. Where do you reside?

A. 201 Sheridan Avenue, Hohokus, New Jersey.

Q. What is your connection or position with the American Can Company?

A. At the present time?

Q. Yes.

A. Manager of sales of the Atlantic Division.

Q. How long have you been continuously connected with the American Can Company last past?

A. I was employed on or about August, 1922, and I have been with them ever since.

Q. How long have you been in your present capacity?

A. October 1 of 1941, when the division was created.

[fol. 341] Q. Prior to that date what was your capacity?

A. Assistant general manager of sales, packers' cans.

Q. Out of the New York office?

A. Out of the New York office.

Q. Do you know the defendant in this action, Bruce's Juices, Incorporated?

A. Yes, I do.

Q. Do you know Mr. J. Adam Bruce?

A. Yes, I do.

Q. In your acquaintance or dealings with Bruce's Juices, Incorporated, have you met other parties who were presented to you as officers, officials or employees of Bruce's Juices, Incorporated?

A. Yes, I have.

Q. Do you recall their names?

A. Fowler, is one; a nephew whose initials I do not recall, who was also a Bruce; and a bookkeeper whose name I cannot at the moment recall. I do not recall any others.

Q. Has the American Can Company had any business dealings with Bruce's Juices, Incorporated, which have come to your knowledge in your capacity?

A. Have we had any dealings?

Q. Yes.

A. Oh, yes, indeed.

Q. They were a customer of the company?

A. A customer of the company.

Q. Do you know whether or not Bruce's Juices, Incorporated, gave any notes to the American Can Company in connection with its dealings or purchases?

A. I know that they did give notes.

Q. Was that over a period of time or on one occasion?

A. Over a period of time.

[fol. 342] Q. Did you ever have any conversations with Mr. J. Adam Bruce in connection with those notes?

A. Yes, I have had.

Q. When and where was that conversation or those conversations?

A. In Mr. Fowler's office in Tampa, Florida.

Q. Do you recall the date of that conversation?

A. Not the exact date, but I would place it along in the late spring of 1942, May or June, somewhere around in there.

Q. Did you on any other occasions have any conversations with Mr. Bruce or any other officials, officers or agents of Bruce's Juices, Incorporated, in connection with notes given by Bruce's Juices to American Can Company?

A. Yes, on the same day that I refer to, that I met Mr. Bruce and Mr. Fowler in Mr. Fowler's office, with Mr. Bruce at luncheon that noon.

Q. And your best recollection is that was in May or June of 1942 in Tampa, Florida?

A. That is my best recollection.

Q. You have no recollection of talking about notes with Mr. Bruce on any other occasion?

A. I have not.

Q. And my questions all refer to promissory notes and not to memoranda, letters or other papers.

A. I assumed that was your question.

Q. I hand you Plaintiff's Exhibits 4, 5 and 6 and ask you if you have seen those in your capacity with the plaintiff?

A. Never.

Q. Briefly, what was the substance or purpose of your conversation with Mr. Bruce and Mr. Fowler in May or June of 1942?

[fol. 343] Mr. Fowler: To which we object, to his stating his purpose. We would be glad to have him narrate the

conversation, but his purpose or motives are improper and irrelevant.

Mr. Allison: I will reframe the question.

Q. What was the subject of your conversation concerning these notes with Mr. Fowler and Mr. Bruce on the occasion you have stated?

A. I was in Florida in connection with my capacity to call on the trade and visit with our own employees in general, and before leaving New York for Florida I was informed that the company had decided to place the accounts in the hands of an outside attorney for collection, our credit department having been unable up to that time to effect collections on what I——

Mr. Fowler: I object.

Q. Don't go any further. In other words you were there to seek collection of these notes?

A. No, sir.

Q. Do you recall the substance of the conversation that took place at that meeting?

A. Yes.

Q. Please relate it.

A. In substance, I delivered a message to Mr. Bruce that the American Can Company had decided to place the account in the hands of an outside attorney for collection. My purpose was merely that of delivering that message, a messenger boy.

Q. Have you had other conversations with Mr. Bruce in your capacity with the American Can Company?

A. Yes, I have had a few.

Q. In those conversations did Mr. Bruce make any comment or statement to you regarding his indebtedness to the company?

[fol. 344] Mr. Fowler: To which we object as leading, suggestive, no time or place given, and simply calling for the statement of what was said at the meeting and giving the witness an opportunity to say yes or no as to whether or not Mr. Bruce did say certain things as suggested by counsel.

A. No.

Q. With what did your contacts with Mr. Bruce deal generally?

A. An attempt to assist him in some merchandizing material, advertisements, placards or a merchandizing scheme,

making the contact for him with advertising people here in the City of New York.

Q. Your contacts with him then dealt with the sales of his merchandize by his company?

A. That is correct.

Q. Did you ever have any controversy with Mr. Bruce regarding his indebtedness to the company?

A. None other than the occasion mentioned in Mr. Fowler's office.

Q. Are you positive that the conversation referred to in Mr. Fowler's office was subsequent to March 30, 1942?

A. I would be guessing. I am reasonably certain. I can check it.

Q. Will you check your records and give to the reporter the time you were in Florida when the occasion related occurred?

A. I will be pleased to do so immediately.

(The witness later returned to the hearing room and stated that the date was June 3rd or 4th, 1942.)

Q. Mr. Roberts, it is stated in the fifth plea filed by the defendant Bruce's Juices, Incorporated, in this case that [fol. 345] at the time the three notes which are Plaintiff's Exhibits 4, 5 and 6, and which are dated February 23, 1942, and March 30, 1942, were delivered to the American Can Company a controversy existed between the American Can Company and Bruce's Juices regarding adjustments of credits claimed by Bruce's Juices to be due on account of certain discriminations, and that the notes were delivered as evidence of the amount due with an express agreement and understanding between the American Can Company and the defendant that the notes would be paid when the adjustments were made and that the notes were never to be paid unless the adjustments should be made. In your capacity with the American Can Company do you have any knowledge or information in connection with the allegation I have just read?

Mr. Fowler: To which we object for the reason that it calls for a conclusion of the witness and calls for hearsay testimony and calls for opinion evidence, as it leaves it wide open as to what he wishes to state, and therefore is incompetent, improper and irrelevant.

The Witness: Will you read the question?

(The question was read by the reporter.)

Q. I will add to that, or do you have any knowledge concerning that matter resulting from your conversations or dealings with Mr. Bruce or the other officers or employees of Bruce's Juices whom you named?

Mr. Fowler: To which we repeat the objection, adding thereto the additional ones that it may call for conversations with employees of Bruce's Juices without naming who the employees were, when the conversations were had and where, and it also calls for his interpretation as to the sub-
[fol. 346] stance of the conversations rather than the conversations themselves.

A. No.

Mr. Allison: You may inquire of the witness.
Mr. Fowler: No questions.

R. M. Roberts.

Subscribed and sworn to before me this 6th day of August, 1943. Rowland W. Philips, Notary Public, Nassau County 1291, N. Y. Co. Clk., No: 432. Commission Expires March 30, 1944. (Seal.)

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Leonard D. Jenkins, called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Allison:

Q. Your home address?
A. 15 Ridgecrest North, Scarsdale, New York.
Q. What is your connection with the American Can Company, the plaintiff in this action?
A. Assistant to the general manager of sales.
Q. In any particular line?
A. Packers' cans.
Q. How long have you been continuously connected with the American Can Company to the present time?
A. 29 years.
Q. How long have you been in your present position?
A. Four years.

Q. Do you know the defendant, Bruce's Juices, Incorporated?

A. Yes, sir.

Q. In your contacts with Bruce's Juices, Incorporated, have you met any other officers or employees of Bruce's Juices who were presented to you as such?

[fol. 347] A. Mr. Thomas, Mr. Smalley; I don't believe he is there any longer.

Q. No others?

A. No others.

Q. Were there any transactions between Bruce's Juices, Incorporated, and the American Can Company during your acquaintance with Bruce's Juices?

A. Yes, sir.

Q. What was the relation?

A. Sale of cans.

Q. They were a customer?

A. They were a customer.

Q. Was your contact with Bruce's Juices in connection with their purchase of cans?

A. Yes, and the servicing of those cans.

Q. In that acquaintanceship does it go over a period of years or of recent origin? Just give us a general idea?

A. Since 1936.

Q. During that period of time have you seen Mr. Bruce from time to time?

A. Yes, sir.

Q. Where have you seen him?

A. In Florida, at his home office and in New York.

Q. In your office, I mean the offices of the American Can Company?

A. In the offices of the American Can Company.

Q. Have you also seen him at other places in New York?

A. Yes, at the hotel probably.

Q. You mean you called on him at his hotel?

A. Yes.

[fol. 348] Q. Did you call on him at his New York office?

A. Yes.

Q. You are generally familiar then with Bruce's Juices dealings with the American Can Company over this period of years?

A. Yes.

Q. Do you know whether or not in connection with those

dealings Bruce's Juices, Incorporated, delivered any promissory notes to the American Can Company?

A. Yes.

Q. Did that occur on more than one occasion?

A. Yes.

Q. Was it a continuing transaction, so to speak?

A. Yes.

Q. Mr. Jenkins, I hand you Plaintiff's Exhibits 4, 5 and 6 in this case and ask you if you have seen those in your capacity with the American Can Company?

A. No.

Q. Have you seen any other notes that were given by Bruce's Juices?

A. No, they would come direct to the credit department.

Q. And I understand you have never had occasion to see any such promissory notes from Bruce's Juices to the American Can Company?

A. No.

Q. About what year if you recall did Bruce's Juices, Incorporated, become a customer of the American Can Company?

A. 1934.

Q. Between June 19, 1936, and March 30, 1942, did Mr. Bruce have any conversations with you relating to any claims or adjustments due to him by the American Can [fol. 349] Company in connection with his dealings with the company?

A. Yes.

Q. Do you recall when the first of those conversations occurred?

A. Any detailed conversation and the only detailed conversation took place, the first one, in April of 1940.

Q. Where was that conversation?

A. In Mr. Nugent's office.

Q. In the building we are now in?

A. Yes.

Q. Who was present at that time?

A. Mr. Bruce, Mr. Nugent and myself.

Q. Will you please relate the substance of that conversation at that time and place as you best recall it?

A. Mr. Bruce came in to talk to us about an adjustment which he contended was due him in connection with truck hauling of cans from our Tampa factory to his Tampa factory, and stated that he was due some approximately

four thousand dollars from the time we first began doing business with him up until that time. And we told Mr. Bruce that we had no adjustment to make with him, because of the fact that all of our other customers in Tampa paid for the truck hauling of cans from our factory to their plants. Mr. Bruce inferred that that was not so, and we told him if it was not so, then the canner was not our customer. He said that he knew some other people in Tampa were getting their cans delivered by truck. We then told Mr. Bruce that if he could substantiate that other canners in Tampa were getting such a delivery we would then give it some consideration. Substantially that is the way the thing was left.

[fol. 350] Q. Did Mr. Bruce after that ever substantiate the statement that other canners were getting cans delivered by truck?

A. No, I have seen nothing to substantiate it.

Q. When I stated that other canners were getting cans delivered by truck I meant of course with the expense paid by the can manufacturer.

A. That is right.

Q. Now that conversation in April, 1940, dealt only with a claim or request by Mr. Bruce that amounted to around $4,000?

A. Yes.

Q. And subsequent to that time nothing further came to your attention from Mr. Bruce?

A. That is correct.

Q. At any time subsequent to April, 1940, did you have any other conversations with Mr. Bruce relating to any claims or adjustments?

A. No, not to any claims.

Q. At any time subsequent to April, 1940, did Mr. Bruce make any statement or comment to you that the American Can Company had discriminated against him in violation of any law?

A. No, sir.

Q. Mr. Jenkins, did you have a conversation with Mr. J. Adams Bruce in the offices of the American Can Company in New York on or about the month of March, 1942?

A. Yes.

Q. Who was present at that conversation?

A. That was in March?

Q. Yes, on or about March, 1942.

A. Mr. Bruce, Mr. Geier and myself.

[fol. 351] Q. And where did that coversation occur?

A. In Mr. Geier's office.

Q. Do you recall about what time it was in the month of March, 1942?

A. No. I guess it was around the 19th or 20th in there some place.

Q. State the substance of that conversation at that time and place as you best recall it.

A. Mr. Bruce at that particular time stated that he had to do something about his financial situation. I think it was at the time that he was going into the Brucentrate, that he wanted to get some other additional capital interested in the business, and in doing that he wanted his statement to look just as good as possible, because it was a question, too, of getting credit from other sources, and unless something was done along that line—unless something was done by us, he could not very well go along. And at that time he proposed a proposition whereby we would write off of our note account some $50,000.

Mr. Fowler: I move to strike that answer because it is evidently in connection with an endeavor to compromise, and therefore improper, and there was no opportunity to object to the answer prior to the making of the same because the question did not indicate that it called for that answer.

Q. Go ahead.

(The latter part of the answer was read by the reporter.)

Mr. Fowler: And we now object to any further statement regarding any discussion as to the settlement of the controversy.

Q. Let me ask you a question, Mr. Jenkins. When you stated that Mr. Bruce referred to a statement, did he identify what statement he meant?

[fol. 352] A. Financial statement.

Q. Of his own company?

A. Yes.

Q. At the time of this conversation in March, 1942, did you know the amount of the indebtedness if any due by Bruce's Juices to American Can Company?

A. Approximately.

Q. Did Mr. Bruce know that amount also?

A. Yes, sir.

Q. That appeared in the conversation?

A. Yes.

Q. Now continue with your account of what occurred at that conference.

Mr. Fowler: I renew the objection.

A. I cannot go any further with it. I can say what was offered——

Q. Just a moment. Then at that time and place Mr. Bruce requested for the reasons you have related that $50,000 be cancelled from his note indebtedness?

Mr. Fowler: I renew the objection.

A. Yes, sir.

Q. And did you then and there make any statement in that connection to Mr. Bruce?

Mr. Fowler: Do you agree that to all these questions the record may show an objection?

Mr. Allison: Yes.

A. In order to help the financial statement of Bruce's Juices——

Mr. Fowler: Wait. Mr. Allison, is that a statement of what was said or what his purpose was?

[fol. 353] (Discussion off the record.)

Mr. Fowler: It is usual and customary in these hearings to have one attorney on each side and I am most happy to deal with Mr. Allison, but I cannot carry on answering Mr. Callahan on the side while trying the matter with Mr. Allison.

Mr. Callahan: Mr. Callahan states for the record that he is appearing here as counsel for the American Can Company and protests on the record to the interference by counsel for the defendant to the answering by the witness to questions propounded by counsel in regular course of examination.

(Discussion off the record.)

(The question and answer were read by the reporter.)

The Witness: Maybe I had better correct that in this way: In order to be of as much assistance as possible, Mr.

Geier offered to defer $100,000 of our note account, to be paid out of profits over a period of five years. On that particular day Mr. Bruce asked us to give further consideration to his proposal, and we left it that way.

Mr. Fowler: I move to strike out the first part of the witness' answer as to the motives for either his actions or Mr. Geier's, as being not responsive to the question, self-serving, opinion, and therefore incompetent and improper.

Q. At that time did you or did Mr. Geier in your presence agree to Mr. Bruce's request?

A. No, sir.

Q. Did you ever subsequently agree to it?

A. No, sir.

Q. Who is Mr. Geier?

A. Assistant general credit manager.

Q. Of the American Can Company?

[fol. 354] A. Of the American Can Company.

Q. Did you then and there tell Mr. Bruce you would submit his request to any other officers or officials of the company?

A. Yes.

Q. Was Mr. Bruce's request granted?

A. No, sir.

Q. Now at that time did Mr. Bruce claim any adjustment or credit due him by American Can Company on account of any discriminations in violation of law?

A. No, sir.

Q. Had he made such claim to you or in your presence prior to that time?

A. No, sir.

Q. Has he made such claim to you or in your presence subsequent to the conversation in March, 1942?

A. No, sir.

Q. At the time of this conversation in March, 1942, at which Mr. Bruce and Mr. Geier were present was any legal action pending by the American Can Company against Bruce's Juices, Incorporated?

A. No, sir.

Q. Do you know of your own knowledge whether at that time any instruction had been given or decision made to bring any legal action?

A. There had not been.

Q. Mr. Jenkins, the defendant Bruce's Juices in this case alleges in its fifth and tenth pleas regarding the three

notes you examined that at the time these notes were delivered to the American Can Company a controversy existed between the American Can Company and Bruce's Juices regarding certain adjustments and credits claimed by Bruce's Juices to be due it on account of discrimina-[fol. 355] tions made by the American Can Company in the sale of cans by selling to competitors at a lower price than sold to Bruce's Juices and granting those competitors discounts and allowances, furnishing certain facilities, and so forth, and that these notes were given by Bruce's Juices to American Can Company upon the express prior condition and understanding between American Can Company and Bruice's Juices that the notes would be paid when these adjustments were made, and that it was agreed between the plaintiff and defendant that the notes should not become due until the adjustments were made and the notes were never to be paid unless the adjustments should be made. I now ask you, Mr. Jenkins, if you ever had any such agreement or understanding on behalf of the American Can Company with Bruice's Juices, Incorporated, or Mr. J. Adams Bruce?

A. No, sir.

Mr. Allison: You may inquire of the witness.

Cross-examination.

By Mr. Fowler:

Q. To get this all straight, Mr. Jenkins, there was a question asked you by Mr. Allison a while ago whether you knew of any controversy or claim which Mr. Bruce claimed had been made against him contrary to law. Now I will ask you if you knew that Mr. Bruce claimed that there had been any discriminations against him or he had been mistreated by you with reference to the price of cans prior to April 18th and 19th, 1940?

A. Any discrimination?

Q. Discrimination or——

A. Not discrimination.

Q. What were his complaints on the question of how he was treated with reference to the price of cans?

Mr. Allison: I object to the question. It is predicated on the fact that there were complaints, which is not previously in the record.

[fol. 356] (The question was read by the reporter.)

Q. I will withdraw that question and ask you what you meant when you answered Mr. Allison's question on direct that you knew, in substance, of no complaints that Mr. Bruce had made against the American Can Company for discriminations in violation of law.

A. I know of nothing from the standpoint of discriminations in violation of law.

Q. Will you explain your answer so we will know what you intended to cover by that answer?

A. Well, the only thing that I know of that, there was any controversy about was the price of the 202 x 312 can. That is the only controversy I know.

Q. All right, then you do know about a controversy about the 312 can, don't you?

A. Sure.

Q. Just what complaint did Mr. Bruce make on that, and when?

A. I could not tell you the exact time without looking into the record.

Q. Well, will you look into the record and tell us?

A. Yes, we can find it in the record.

(The question and answer were read by the reporter.)

Mr. Allison: He has not said what the complaint was which was covered in your question, and I thought we could cover that now.

The Witness: His complaint was that the price of the 202 by 312 can was out of line with the 202 x 314 can, and that was answered by the fact——

Q. I am not asking you for an explanation. I am asking your what his complaint was, and I take it counsel will ask you for your explanation.

[fol. 357] Mr. Callahan: You may finish your answer. Go right ahead. You were interrupted by counsel.

Mr. Fowler: Let it be understood that where the witness is starting to answer on a line not asked and making a voluntary statement, that it is proper for counsel cross examining to call this to the witness' attention. And after all, this is cross examination.

Mr. Callahan: Proceed and complete your answer, Mr. Jenkins.

(The answer was read by the reporter.)

The Witness: That the 202 x 312 can was quoted to the Texas canners on the basis of f. o. b. Houston, which quotation carried a 50-cent freight rate. The 202 x 314 can which Mr. Bruce used entirely in his Florida operations was quoted at a higher price but there was a freight allowance made based on the water rate of freight from Baltimore to Tampa.

Q. These cans were all of the same grade and quality, were they not, Mr. Jenkins?

A. Yes, sir.

Q. Now, Mr. Jenkins——

Mr. Allison: The plaintiff moves to strike the question and answer as immaterial, irrelevant and not cross of any question asked an direct examination.

Q. Now, Mr. Jenkins, you carried on quite a bit of correspondence with Mr. Bruce in 1940 between January and April 18th did you not?

A. Yes, sir.

Q. During that time Mr. Bruce was trying to get you to reduce the price on the little cans, wasn't he?

[fol. 358] Mr. Allison: Objected to unless counsel identifies what little cans refer to.

Mr. Fowler: I will be glad to stop and do that.

Q. You are familiar with the fact that the American Can Company puts out a little can known in the trade as individual service, were you not?

A. Yes.

Q. Was that a Sanitary can?

A. Yes.

Q. Mr. Bruce's contract called for the purchase of Sanitary cans, did it not?

A. Yes.

Q. And Mr. Bruce as a matter of fact put out fruit and vegetable juices in the 202 x 300, the 202 x 309, the 202 x 312 and the 202 x 314 cans, didn't he?

A. Yes.

Q. And I will ask you again if during January, February, March and April of 1940 Mr. Bruce was not trying

to get you to reduce the prices on the small cans which he purchased or wanted to purchase?

A. Mr. Bruce was continually trying to have us do that.

Q. And trying to get suggestions from you as to any method he could employ to bring about a saving in cost, was he not?

A. Yes.

Q. Now there were some problems which caused you to ask for specific confgrences with Mr. Bruce during the first few months of 1940, were there not?

A. What about?

Q. Well, do you remember whether or not there were matters calling for special conferences that you wished to talk to Mr. Bruce about, you or your associates?

[fol. 359] A. Probably about that time he was planning to reduce the number of colors on his lithograph can. I think I helped him considerable on that.

Q. He did that to reduce cost, didn't he?

A. Yes.

Q. Do you remember being asked by Mr. Bruce in March to make a special study to see if there was any way you could reduce his cost on those little cans?

A. Yes, sir.

Q. Do you remember whether or not you had a conference with Mr. Bruce within the first week of March, 1940?

A. I do not recall, no, sir.

Q. You just don't remember whether you did or whether you did not?

A. Well, unless you tell me something that it was about.

Q. Well, the point I wish to make is you did have a number of conferences in that period of time with reference to Mr. Bruce's affairs?

A. I do not recall whether it would all come within that period that you are talking about.

Q. Now, what date was this conference that you testified regarding a while ago in April, 1940?

Mr. Allison: March.

Q. Was it March, 1940?

A. Yes, it was, March, 1940.

Q. Then that may have been the conference to which I referred a moment ago as being the first week of March, or would you think it was later than that?

A. The conference we had in Mr. Geier's office was around the 19th or 20th of March. It might have been a few days later, I am not certain of the date.

[fol. 360] Q. I am referring to 1940, Mr. Jenkins.

A. 1940?

Q. I did not want to confuse you, because you did testify to a conversation in 1942, and I wanted to straighten you out on the year. You are straight in your mind now are you, with reference to the conference in March, 1940, as against March, 1942?

A. Oh, yes. The March, 1942, was the last visit I think I had with Mr. Bruce in Mr. Geier's office, or in April of 1942.

Q. Can you repeat the substance of the conversation which you had in March, 1940, when Mr. Bruce was present, and state who else was there?

A. Do you mean in connection with the truck hauling?

Q. All the conversation as you recall it that you had with Mr. Bruce in March, 1940.

A. I could not do that.

Q. Then you had more than one conference in March, 1940, do you think, with Mr. Bruce?

A. I would say it is entirely possible.

Q. Then you do not know how many conferences you had with him in March 1940?

A. No, sir.

Q. You have no recollection of the substance of any conversation but this one, that you referred to?

A. I have a recollection of the meeting in connection with lower price on these small lithograph juice cans.

Q. Do you recall when that was? State as best you can remember, realizing you cannot state exactly.

A. It was probably around sometime in the spring of 1940; it may have been in the month of March. I do not know.

[fol. 361] Q. Then you had another conference in Mr. Nugent's office regarding which you testified on direct, in which you discussed the transportation charges in Tampa?

A. Yes.

Q. Do you recall anything else discussed at that conference?

A. No, sir.

Q. Will you state the substance of the conversation that you referred to that you had with Mr. Bruce regarding the endeavor to lower the cost of the small lithograph cans?

A. I told him at the time that we would look into the matter and see what we could do about it, and as I recall it was about that time that I made the suggestion to Mr. Bruce about reducing the number of prints on the can.

Q. He asked you for any idea that you might have as to how to reduce it and that was the one you gave him?

A. Yes, sir.

Q. Did he follow that suggestion?

A. Yes, sir.

Q. Do you remember receiving a letter from Mr. Bruce dated April 6, 1940, addressed to American Can Company, New York City, N. Y., your attention, in which he enclosed you a clipping regarding the reduction of the price on cans in Texas?

A. I do not recall the particular letter, no, sir.

Q. For the purpose of refreshing your memory I now exhibit to you what purports to be a copy of a letter from Bruce's Juices to the American Can Company, your attention, dated April 6, 1940 (handing paper).

A. Where is the clipping?

[fol. 362] Q. Well, the clipping, Mr. Jenkins, was sent to you.

A. Yes, that is right. I do not remember what the clipping was about particularly. I can look that clipping up.

Q. Is it difficult to do?

A. I should not think so, no.

Q. Would you do that then. Will it take you just a moment?

A. I think we can get it pretty quickly.

Q. Very well, see if you can.

(After returning to the hearing room) I cannot locate it.

Mr. Allison: We will try to locate it before you leave here, and if we find it will produce it.

Q. You do recall the letter, do you?

A. I cannot recall the letter particularly or the clipping either.

Q. In order to further refresh your memory I hand you what purports to be a copy of your answer to Mr. Bruce.

The letter is on what purports to be your stationery. It is dated April 11, 1940, addressed to Mr. Bruce and signed "Len."

A. Yes.

Q. You do remember that?

A. I do remember this, yes.

Q. Does that refresh your memory——

A. Not as to the clipping. I cannot get that.

Q. You do not remember what it was about?

A. No.

Q. The letter did refer to a recent visit you had had with Mr. Bruce?

A. Yes.

[fol. 363] Q. Now, Mr. Jenkins, do you recall quite a lengthy conference held in this office, that is the office at Park Avenue, New York City, of the American Can Company, which was followed by a further conference while you were having lunch, in which you and several other representatives of the American Can Company had a long conference with Mr. Bruce on the 18th and 19th or the 18th or 19th of April, 1940?

A. No.

Q. You do not remember that conference at all?

A. No, sir. April 18th or 19th?

Q. 1940.

A. No, I cannot tie in the dates.

Q. You have no recollection of such a conference which, as I say, it is our contention was a lengthy conference?

Mr. Allison: Mr. Fowler, I have no objection to your giving him the subject or anything that might refresh his recollection and will not object on the ground it is a leading question, if that will be helpful.

Q. At which conference it is our contention that among other things discussed was the complaint by Mr. Bruce of the price at which you had sold the 312 can and were selling the 312 can and in which Engelman Gardens of Texas was mentioned, and the complaint of the price given the 312 can as compared with prices given other sizes of small cans, in which Mr. Bruce was interested. Does that refresh your memory at all?

A. There were a number of talks just along that line. I do not recall what date it was.

Q. Then you do remember having several talks with Mr. Bruce in which he did claim, to put it in common language, that he was being mistreated with reference to the price which you had made on the 312 can?

[fol. 364] A. I certainly could not say he was mistreated.

Q. In which he claimed he was mistreated.

A. He claimed he was mistreated, yes.

Mr. Fowler: That is all.

Redirect examination.

By Mr. Allison:

Q. Mr. Jenkins, in response to a question on cross examination I understood you to state that the 312 can at Houston carried a 50 cent freight rate. I don't understand what that means, and I would like for you to explain what carrying a 50 cent freight rate means.

A. The 202 x 312 can sold at Houston for $9.68 per thousand. That price was available to all customers, just the same as the 202 x 314 can price was available to all customers, and the 50 cent per hundredweight freight that I mentioned was the cost of transportation to the Valley canner from Houston to destination.

Q. Who paid the 50 cent freight rate?

A. The customer.

Q. That was the railroad charge for transporting that particular can in the designated quantity to the point in the Rio Grande Valley?

A. That is right.

Q. When you stated in these various conversations that Mr. Bruce complained of the price, did he ever complain that you were selling the same size can to other customers at less than you were selling it to him?

A. No, sir; never.

Q. Am I correct in my understanding of your testimony that his complaint was that the 314 can should be sold for the same price as the 312?

[fol. 365] Mr. Fowler: To which I object as being, as was the previous question, leading, suggestive and placing the answer carefully in the mouth of the witness so that the witness may answer yes or no.

Mr. Allison: I will withdraw the question to meet the objection and I will ask the witness this:

Q. Mr. Jenkins, what was the complaint of Mr. Bruce on the price of the small can?

A. His complaint was that we were selling a can of a different size at a lower price than we were selling his can to him.

Q. Mr. Jenkins, is there any difference in size between the cans you referred to as the 312 and the 314?

A. Yes, sir.

Q. What is that?

A. Two-sixteenths of an inch in height.

Q. Were all cans manufactured by the American Can Company of the size 202 x 312 and 202 x 314 of the same grade and quality?

A. No, some of them would be lithographed cans, which makes them a better quality can.

Q. Are there any other differences?

A. Maybe a different type of plate.

Q. You mean weight of plate?

A. Maybe a different weight.

Q. Did American Can Company lacquer any of these small cans?

A. Yes.

Q. Is that a different process than the lithographing you referred to?

A. Yes.

Q. Would that have any bearing on the grade and quality of the can?

A. Oh, yes.

[fol. 366] Mr. Allison: I think that is all.

Recross examination.

By Mr. Fowler:

Q. Tell us, Mr. Jenkins, what you mean by grade in Sanitary cans?

A. Grade would mean the type of plate by gauge. Some plates carry a heavier coating.

Q. Coating of what?

A. Tin.

Q. You mean it is a thicker tin, is that what you mean?

A. Yes.

Q. You mean grade goes by the weight of the tin plate?

A. Grade would mean the weight of the tin plate—well, grade would really mean the type of tin plate.

Q. The type, wouldn't it?

A. Yes.

Q. And what would quality be?

A. Well, it would be the type of can as to how it is enameled, lithographed and so on.

Q. Then quality has to do with what is done to the bare can and what is done after it is manufactured—the type of finish on the can is how you determine the quality.

A. Well, as I said before the quality of the can would be—the tin coating of course would mean the relation to the product. Some cans are sold for various products that carry charcoal plate or a heavier tin coating than others.

Q. Does grade and quality mean the same thing in your mind?

A. It is pretty difficult to distinguish.

[fol. 367] Q. In your mind there really is no difference between grade and quality, they are used interchangeably, are they not?

A. No, we would not use the same plate in for instance the No. 2 can as we would in the No. 10 can.

Q. Well, No. 2 and No. 10 would be a different grade?

A. Different plate.

Q. And therefore a different quality?

A. Yes.

Q. In other words, you are using the words grade and quality interchangeably, are you not?

A. Yes.

Q. The cans that have the same coating of tin then are of the same grade and quality, is that right?

A. Unless there is a difference in the weight of the plate.

Q. Well, is not that what you referred to as coating a minute ago?

A. No, sir. The gauge of the plate, the weight of the plate.

Q. Then cans of the same weight of plate are of the same grade and quality, is not that correct?

A. Yes, sir.

Q. Grade and quality does not necessarily refer to size unless there is a difference in the weight of the plate, does it?

A. No.

Q. When you change the weight of a plate of a man's cans, do you notify him?

A. No, sir, not under our contract. Our contract calls for plates as serviceable. Our new can contract calls for plates as serviceable as were used in the regular performance of our business.

[fol. 368] Q. Then if they are serviceable they are of the same grade and quality, are they not?

Mr. Allison: I object to the question on the ground it calls for an opinion of the witness and tends to be argumentative and immaterial and irrelevant.

Q. Answer the question, please.

A. I might say that I am not qualified to talk about the type and quality of the plate. Somebody other than myself would have to give that——

Q. You have just given us the benefit of your idea with respect to your position in this company.

A. Yes. I am not an expert on the grade and quality of plate.

Q. You are an expert on the finished product, are you not?

A. I am in the sales department. I won't qualify myself as an expert.

Q. You have been in the Can Company since 1922 and have risen to your present position and you don't consider yourself an expert on cans?

Mr. Allison: Objected to on the ground it is argumentative, calls for a conclusion, is harassing to the witness, is not in cross of anything brought out on direct; and that the matter therein covered has already been answered by the witness as fully as possible, and further that the question is clearly immaterial and irrelevant and calling for opinion evidence.

A. I happen to know enough about cans to be able to sell them, or at least sell American cans. In the sale of cans a lot — these things you speak about are never discussed. [fol. 369] We deliver a good commercial can and that is why we have the customers that we do have. A man does not have to be an expert on plates and what not to sell cans.

Q. I asked you if you were an expert on cans, but since you have changed the type of can don't you know a great deal about cans that you have been handling for 25 years?

Mr. Allison: Same objection as to the previous question.

A. Certainly I know something about cans.

Q. I say don't you think you know a great deal about them?

A. I think I do, yes, sir.

Q. Now, as I understand the substance of your conversation that you said Mr. Bruce had with you and Mr. Geier in March, 1942, it was that Mr. Bruce just asked you to mark off $50,000 of his obligations to the company, just so it would help the looks of his statement?

Mr. Allison: Objected to. It is not in cross of anything brought out on redirect.

A. No, it was not just for that purpose, according to Mr. Bruce's contention. He said that he had built up this small juice can business and that when he had gotten it to a certain point that we had gone out and interested other people in packing the individual juice can, which of course we do not subscribe to.

Q. I will ask you if at that conversation he did not complain of the price you had sold Engelman Gardens the 312 can for?

A. No, sir, he did not complain at that conference.

Q. He simply just asked you to wipe off the $50,000 because he had built it up, is that right?

A. No, because he contended that his business had been hurt because of the fact that—because of our going out and interesting other people in the small juice can, and our an- [fol. 370] swer to that was that we told Mr. Bruce that he did not have any exclusive on the small juice can, that we had requirement contracts with our other canners and that if they felt that they could make money out of the small juice can we certainly could do nothing about keeping them out of the business.

Q. And he made no complaints about the price you were selling the 312 can and the way you were selling it?

A. No, it was mainly just what I have said.

Mr. Fowler: That is all.

Leonard D. Jenkins.

Subscribed and sworn to before me this 10 day of August, 1943. Rowland W. Phillips, Notary Public, Nassau County 1291, N. Y. Co. Clk. No. 432. Commission Expires March 30, 1944. (Seal.)

HAMILTON HUBBARD HOWRY, called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Allison:

Q. Where do you reside?

A. 6 Highwood Avenue, Larchmont, New York.

Q. Mr. Howry, what is your connection with the American Can Company?

A. Assistant manager of sales, Atlantic Division.

Q. Is your headquarters in the New York office of the American Can Company?

A. It is.

Q. How long has that been the case?

[fol. 371] A. A little less than two years, since November, 1941.

Q. Prior to that time what was your position with the company?

A. District sales manager, Atlantic District.

Q. With headquarters where?

A. Baltimore, Maryland.

Q. How long were you in that position?

A. I was in that position from February, 1939, until I moved to New York.

Q. And prior to February, 1939, what was your position?

A. Assistant sales manager, Gulf Division American Can Company, with headquarters at New Orleans, Louisiana.

Q. How long were you at that location?

A. Roughly 16 years.

Q. When did you become connected with the American Can Company?

A. I became connected with the American Can Company in Chicago in 1919.

Q. And you have been with them continuously since that time?

A. Correct.

Q. Do you know Bruce's Juices, Incorporated, of Tampa, Florida?

A. I do.

Q. What is their relation, if any, to the American Can Company?

A. They are a former customer of the American Can Company.

Q. Do you know Mr. J. Adams Bruce?

A. Yes.

Q. Do you know him as an official of Bruce's Juices?

A. Yes.

[fol. 372] Q. Do you know any other officers, officials or employees of Bruce's Juices who were presented to you as such?

A. I do.

Q. Who are they?

A. I know Mr. Thomas, Mr. Peer and I also knew Mr. Smalle, who was formerly connected with them, but who I understand is not connected with them now while he is in the Army.

Q. About what time was your first contact with Bruce's Juices in connection with your position with the American Can Company?

A. My first contact with them in that position was after I moved to Baltimore in 1939.

Q. Did you know the firm of Mr. Bruce prior to that time?

A. Yes, I had met Mr. Bruce and other members of his firm when I was located in New Orleans.

Q. Did you have any business dealings with them for the American Can Company at New Orleans?

A. I did. They had a plant in the Rio Grande Valley which came under our supervision.

Q. And do you recall about when your first dealings with Mr. Bruce began?

A. I would say about 1937.

Q. Mr. Howry, during the period from June 19, 1936, through December 31, 1942, did you have any discussions or conversations with Mr. J. Adams Bruce relative to any indebtedness of Bruce's Juices to American Can Company?

A. During what period?

Q. June of 1936 to the end of December, 1942.

A. I did.

Q. Do you recall where and when those conversations or discussions took place?

[fol. 373] A. Yes. I had a discussion with Mr. Bruce in Mr. Geier's office in this building in April, 1942.

Q. Was that the first discussion you ever had with Mr. Bruce relating to any indebtedness from Bruce's Juices to American Can Company?

A. To the best of my recollection it was.

Q. Do you recall the approximate time in the month of April, 1942, when that conversation occurred?

A. About the middle of the month.

Q. And you say that Mr. Geier was present?

A. Mr. Geier was present and Mr. Leonard Jenkins.

Q. Did you ever have similar discussions or conversations regarding such indebtedness with any other officer, official or agent of Bruce's Juices in addition to Mr. J. Adams Bruce?

A. I did not.

Q. Will you relate to the best of your recollection the conversation which occurred in Mr. Geier's office in April, 1942.

Mr. Fowler: In view of the fact that from the testimony of Mr. Jenkins we believe that the conversation regarding which the witness will testify is in connection with a purported endeavor to compromise a claimed indebtedness between Bruce's Juices and American Can Company and therefore incompetent, we wish to object at this time, and anticipating that counsel will insist upon an answer, ask that this objection be considered made to all questions in connection with this conversation.

Mr. Allison: That is agreeable.

A. Mr. Bruce had had a previous talk with Mr. Geier and Mr. Jenkins at which I was not present, and during that previous talk had brought up the point that he felt he was entitled to a credit, asking that we write off a portion of the indebtedness of Bruce's Juices, to apply this [fol. 374] against the note indebtedness, and wished that we would write off $50,000 of the note indebtedness, spreading the remaining approximately $50,000 over a period of ten years, payable $5,000 a year. I was not present at the earlier conversation, but Mr. Bruce again brought this point up and it was pointed out to him that we did not have any authority to approve such a cancelling of his indebtedness. Mr. Bruce on his part stated that he wished to have this amount written down because he wanted to do some refinancing and felt that this would be more possible if his indebtedness to our company were not in a current form. Mr. Geier made an offer to Mr. Bruce that we would accept a deferred payment of the full amount

owing our company, spreading this over a period of five years and accepting as payment on principal a certain percentage of each year's profits of Bruce's Juices. As I recall it, there was no specific percentage of profits mentioned during the conversation. This offer of Mr. Geier's was not acceptable to Mr. Bruce, and he so informed us.

Q. At that time or prior thereto had Mr. Bruce made any claim or statement to you that Bruce's Juices was due an adjustment from the American Can Company of any sort?

A. As I recall it, during that same conversation Mr. Bruce brought up the point that he felt he was entitled to an adjustment to compensate him for trucking charges on cans trucked from our Tampa plant to his factory.

Q. Was any other matter of adjustment claimed or mentioned then by Mr. Bruce?

A. Yes, Mr. Bruce also brought up the point that he felt he had been discriminated against in the matter of prices of cans as compared with certain other customers of our company located in Texas.

Q. Do you recall whether the particular size or type of can was mentioned by him on which he made that statement?

[fol. 375] A. Mr. Bruce felt that the shorter can used generally in Texas, known as the 202 x 312 can, was priced on a lower basis than the can which he used in Florida, which is known as the 202 x 314 can.

Q. Do you know of your own knowledge whether Mr. Bruce was quoted a price on the 312 can similar to the price in Texas?

A. Yes. In fact, I quoted Mr. Bruce such a price myself when I was in Baltimore.

Q. Do you recall the date?

A. It was in the latter part of 1939, September I believe.

Q. And where was that price?

A. That price was f. o. b. our factory at Baltimore, Maryland.

Q. And was that the same price as the price in Texas that you mentioned?

A. The same price as we charged f. o. b. our factory at Houston, Texas.

Q. Was that price available to any customer who wanted to buy that size of can?

A. It was.

Q. And was that size can so far as you know sold on that same basis to all?

A. It was.

Q. I understood you to testify that Mr. Bruce's contention was that the 314 can should be sold for the same price as the 312 can.

A. I don't know that he felt it should be sold for that same price, but he felt that the price was unduly high as compared with the shorter can.

Q. You stated that this conversation when all these matters were discussed took place in April, 1942?

[fol. 376] A. That is correct.

Q. And prior to that time had you had any conversations with Mr. Bruce relating to these same matters?

A. To the best of my knowledge, none.

Q. I hand you Plaintiff's Exhibits 4, 5 and 6 and ask you if you have seen these exhibits or are familiar with them.

A. I do not think I ever saw them before, but I am thoroughly familiar with them.

Q. Do you know whether or not in its dealings with American Can Company Bruce's Juices gave promissory notes?

A. They did.

Q. You knew that?

A. Yes.

Q. Mr. Howry, this suggestion by Mr. Bruce for the cancellation of $50,000 of his note indebtedness was made at a conversation prior to the one at which you were present?

A. That is correct.

Q. And the subject was brought up again at the conversation at which you were present?

A. That is correct.

Q. Other than the conversation you have described, was there any controversy between you or the American Can Company and Mr. Bruce or Bruce's Juices regarding the account of Bruce's Juices with American Can Company?

A. I do not know of any.

Q. Then the conversation you have described is the only one to your best recollection where anything was said about the account of Bruce's Juices with American Can Company?

A. That is correct.

Q. Mr. Howry, in the fifth and tenth pleas filed in this action by Bruce's Juices it is alleged by it that Plaintiff's

[fol. 377] Exhibits 4, 5 and 6 were delivered to the American Can Company and at that time a controversy existed between the company and Bruce's Juices regarding certain adjustments and credits claimed by Bruce's Juices on account of discriminations made by American Can Company in the sale of cans, and that at the request of the Can Company these exhibits were delivered as evidence of the amount due, and that at that time there was an express understanding between the American Can Company and Bruce's Juices that these notes would be paid when and at the time such adjustments were made and they would not be paid unless such adjustments were made and that the Can Company received the notes under that agreement and agreed then with Bruce's Juices that the notes should not become due until the adjustments were made and were never to be paid unless the adjustments were made. Do you personally have any knowledge of any such understanding or agreement?

A. I do not.

Q. At the time of the conversation in April, 1942, was any suit pending by the American Can Company against Bruce's Juices, to your knowledge?

A. There was not.

Q. To your knowledge was there then any instruction or determination to institute any suit by the company?

A. There was not.

Mr. Allison: That is all.

Cross-examination.

By Mr. Fowler:

Q. The American Can Company did business in Louisiana and Texas under the name of American Can Company Southern, didn't it?

A. That is correct.

Q. Now I believe you said you quoted Mr. Bruce the price of the 312 can in Baltimore in September 1939, is that what you said?

[fol. 378] A. Yes.

Q. What price did you quote him?

A. That price of that can that I quoted him was our regular contract price on that size, the same price that we quoted every canner in the Rio Grande Valley who was drawing that can out of Houston.

Q. What was that price?
A. The price as I recall it was $9.64.
Q. $9.64?
A. I am not sure about that now.

Mr. Allison: Let me state that we will produce for your information and for the record a photostatic copy of the letter that the witness has referred to, directed to the defendant.

Q. Was that quotation by letter?
A. By letter, yes, sir.
Q. In September, 1939?
A. Yes, sir.
Q. And you will produce that letter?
A. Yes, sir.
Q. Was that for the Texas operation or for the Florida operation?
A. That was for the Florida operation.
Q. Was that freight equalized or not equalized?
A. That freight was not equalized. That was strictly f. o. b. Baltimore, Maryland.
Q. The freight at that time was equalized on the 202 x 300 can for Tampa?
A. Yes.
Q. And on the 202 by 309, was it not?
A. Yes.
Q. And on the 202 by 314?
A. That is correct.
[fol. 379] Q. These cans were all the same except for a little different height, were they not?
A. They were the same except for difference in height and except for a difference in qauntity production and such items as that.
Q. But the pivotal can was the same?
A. That is correct.
Q. That was true of the cans you sold in Houston, Texas, and Tampa, Florida, too, was it not?
A. Yes.

Mr. Fowler: That is all.

Redirect examination.

By Mr. Allison:

Q. You stated in answer to a question that these little cans were the same except for the height. Were all of those cans plain?

A. The cans were not all plain, no. They were very largely lithographed.

Q. Were any treated in any other fashion than lithographing?

A. Yes, a great many of them had ends which were enameled on the outside.

Q. What did you mean then when you said that all these little cans were the same?

A. They were the same general type of can. As I mentioned earlier, there were various differences in the different sizes which were mentioned in quantity of production, some of the sizes may have been lithographed and other sizes may have been plain. Some sizes may have had outside enameled ends and other sizes may have been plain. Those variations existed in all the sizes.

Q. Is it true that these little cans were the same in diameter and the same in type of tin plate but they may [fol. 380] have differed if some were lithographed, lacquered, enameled or otherwise treated?

A. I do not believe I understand that.

(The question was read by the reporter.)

The Witness: They were the same in diameter and in type of tin plate.

Q. Does the lithographing, lacquering, enameling or otherwise treating of a plain tin can affected the cost?

A. It does.

Q. What sort of can did the $9.68 or $9.64 price contemplate?

A. That contemplated a plain tin can.

Q. Was it the custom of the American Can Company to add the cost of extras to the cost of the plain tin can?

A. It was and is.

Q. Did all of the customers on the small can buy the same kind of can? And by that I mean were all lithographed, all lacquered, all enameled, or did the orders vary?

A. The orders varied, and even where two orders by two different customers were both lithographed, they still might

vary in the number of colors used in producing that particular label, which in turn would of course affect the price of the can.

Mr. Allison: That is all.

Recross-examination.

By Mr. Fowler:

Q. As a matter of fact, some of the customers for the little can had part of their cans lithographed, some in one way and some in another for different products, did they not?

A. That is right.

Q. It was for that reason that you made the price on the bare can and then added the cost of the lithographing in such cans as they got?

A. Yes.

[fol. 381] Q. The $9.68 was the price of the bare can?

A. That is right.

Q. And you made him the price of $9.68 for the 300, the 302 or the 312?

A. That is correct.

Q. And then added the lithograph charge according to what the customer wanted?

A. Yes.

Q. And the definite charge for the lithographing was definite throughout your business?

A. Yes.

Q. But the bare cans themselves were all of the same grade and quality, on the little cans?

A. They were of the same grade and quality except that of course we use different weights of tin plate for different sizes of cans. So far as I know the sizes we are talking about were made of the same weight of plate, however.

Q. The tin plate affected the cost to you, didn't it?

A. I did not get that.

Q. I mean the weight of the tin plate affected the cost to the American Can Company?

A. Oh, naturally.

Q. But as far as you know these were all the same weight of tin plate in these little cans during this period?

A. So far as I know.

Mr. Fowler: That is all.
Mr. Allison: I have no other questions.

Hamilton Hubbard Howry.

Subscribed and sworn to before me this 6th day of August, 1943. Rowland W. Phillips, Notary Public, Nassau County 1291. N. Y. Co. Clk. No. 432. Commission Expires March 30, 1944.

[fol. 382] The witness, Hamilton Hubbard Howry, before signing the foregoing deposition, made the following corrections:

Page 77, line 8: The figure $9.64 should be $9.68. (P. 378, line 7 of this record.)

Page 81, line 15: The answer should be deleted and the following inserted in its place: "The price of $9.68 was made to him for the 312 can." (Page 381, line 5 of this record)

Hamilton Hubbard Howry. (Notarial Seal.)

Adjourned to July 23, 1943, at 10 A. M.

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NEXT PLAINTIFF'S EXHIBIT NO. 7

AMERICAN CAN COMPANY

vs.

BRUCE'S JUICES, INC.

New York, July 23 1943.

Met Pursuant to adjournment.
Present: Mr. Allison, Mr. Callahan and Mr. Fowler.

HENRY L. SNYDER, recalled for further examination, testified as follows:

The Witness: Yesterday I was asked if all of the notes covered can purchases. I have investigated and found that the major portion of the notes covered can purchases, but in addition they did cover certain miscellaneous charges, principally for machine parts.

The note that was dated March 30, 1942, for 12,000 and due June 29, 1942, covers can invoices and it also covers machine parts to the amount of $227.85.

The note dated February 23, 1942, for $7,039.25 due May 25, 1942, covers can invoices entirely.

[fol. 383] The original notes which were taken and which were renewed and which renewals were in turn consolidated into the note dated March 1, 1940, for $107,784.60 due April 15, 1940, covered can invoices and they also included charges for machine parts, $179.25, a charge for can openers of $64.69 and items of ocean freight and insurance which amounted to $10.35.

By Mr. Fowler:

Q. Then, Mr. Snyder, except for the items you have listed on the notes described all the rest of the notes represented the purchase price for cans delivered, is that correct?

A. That is right. When referring to a note yesterday which was dated August 31, 1940, for $27,184.60 due November 29, 1940, I was asked when the note was received and entered. We received and entered that note on October 22, 1940.

Q. That followed a conference in Tampa between yourself, Mr. Slayton and Mr. Geier and Mr. Bruce in Tampa, or do you know?

A. I don't know. I know that the note renewed $1400 of a note dated April 15, 1940, for $107,784.60 which was due June 14, 1940, and it also renewed $25,784.60 of a note dated June 14, 1940, for $100,784.60, which was due August 31, 1940.

There is a letter which refers to $1400 which I wrote June 7, 1940. This is a copy. This letter might throw some light on that.

Mr. Fowler: May I look at the letter?

Mr. Allison: Yes. I would as soon let it go in. It is a letter to Mr. Bruce, I believe.

(Mr. Fowler examines letter.)

The Witness: And in referring to the various original notes yesterday I said that the original indebtedness began September 19, 1938. That is the date of a certain note that [fol. 384] was listed. It was the only note on the list which I was looking at which was dated September 19, 1938, and I verified or looked at the records in regard to that note yesterday afternoon and I found that the note is dated September 19, 1938, but it bears interest at the rate of 5 per cent

after September 19, 1939. It covered 1939 invoices and was taken into our records subsequent to September 19, 1939. So it appears that that note was inadvertently dated September 19, 1938, but actually was a 1939 note and was so handled.

Q. That is your conclusion from looking at the note?

A. That is my conclusion from looking at the note and the records.

Yesterday I was also asked if a certain endorsement amounting to $7,384.63 on a note dated November 29, 1940, for $27,184.60 which was due February 27, 1941—I was asked if that endorsement represented a cash payment. I find that we credited that amount against the note and that it represented a two per cent overriding discount on the 1940 purchases.

Q. That was the discount allowed to all your customers, was it?

A. That is true. I believe that that completes all the information which I could not furnish yesterday.

Mr. Allison: The plaintiff offers in evidence the letter produced and identified by the witness, dated June 7, 1940. If the defendant desires, we will call on the defendant to produce the original, or by agreement let that be accepted as the original.

Mr. Fowler: I have not the original of the letter of which the one produced by the witness is a copy, but we offer no objection.

Mr. Allison: Since the letter is torn, may I ask if it is agreeable for us to substitute a better copy?

Mr. Fowler: No objection.

[fol. 385] Copy of letter dated June 7, 1940, was marked Plaintiff's Exhibit No. 7, 7-23-43, R. W. P.

Mr. Allison: Have you anything more from Mr. Snyder?

Mr. Fowler: No.

Henry L. Snyder.

Subscribed and sworn to before me this 6th day of August, 1943. Rowland W. Philips, Notary Public, Nassau County 1291. N. Y. Co. Clk. No. 432. Commission Expires March 30, 1944. (Notarial Seal.)

ANDRED W. GEIER, called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Allison:

Q. Your home address.

A. 113 St. Pauls Place, West Hempstead, New York.

Q. Mr. Geier, what is your position with the American Can Company, the plaintiff in this case?

A. Assistant general credit manager.

Q. What phase of the company's business is handled in your department?

A. Credits and collections.

Q. The head of that department is who?

A. Mr. James E. Sarver.

Q. And you are his assistant?

A. That is right.

Q. How long have you been connected with the company in that department?

A. 30 years.

Q. Continuously?

A. Continuously.

[fol. 386] Q. Mr. Geier, do you know Mr. J. Adams Bruce, the gentleman present here this morning?

A. Yes.

Q. Do you know Bruce's Juices, Incorporated, of Tampa, Florida?

A. I do.

Q. What relation if any does Bruce's Juices bear to the American Can Company?

A. Well, they were a customer of ours and they owe us a substantial amount.

Q. In your position and in your department have you had anything to do with the relationship between Bruce's Juices and the American Can Company?

A. I have.

Q. What has been that duty?

A. In recent years I have checked their financial condition, arranged for the extension of credit and also handled the collection of the account.

Q. You used the expression in recent years. What period of time do you intend to cover by that expression?

A. I would say that I personally handled the account from the latter part of 1940.

Q. Prior to that time did you know anything about the account in the department?

A. Yes.

Q. Have you had personal knowledge of the account since 1936?

A. Yes.

Q. In the handling of the account have you met any parties who were presented as officers, officials or employees of [fol. 387] Bruce's Juices other than Mr. J. Adams Bruce?

A. I have.

Q. Do you recall the names?

A. Gene Bruce, Jerry Peer and I met a Mr. Thomas on two or three occasions.

Q. Were they represented to you as having any special or particular connection with Bruce's Juices?

A. Mr. Peer when I first met him, I believe he was their bookkeeper, and since then I think he has been made an officer of the company. Mr. Thomas I believe was represented as an officer of the company. And Eugene Bruce, I don't believe had any title in the company.

Q. In what form has the indebtedness of Bruce's Juices to the American Can Company to which you referred been represented?

A. In the form of interest bearing notes.

Q. Have you had occasion in your position to handle any of those notes?

A. I have.

Q. Was the indebtedness represented in other forms than promissory notes?

A. We had an open account as well.

Q. Mr. Geier, I hand you for your inspection Plaintiff's Exhibits 4, 5 and 6 respectively, and ask you if you have seen those heretofore?

A. I have. They all bear my approval.

Q. Do you recall whether or not, from your approval, that they were received in your department on or about the dates that they bear?

A. I would say they were.

[fol. 388] Q. Mr. Geier, have you had occasion in your position to have correspondence from time to time with Bruce's Juices?

A. I have.

Q. Mr. Geier, I hand you what purports to be an original letter dated March 1, 1940, from Bruce's Juices, Inc., to American Can Company, and ask you if you can identify it.

A. I can.

Q. Did you receive that letter?

A. It was received in our department on March 4, 1940.

Q. Was it referred to you?

A. It was addressed to Mr. Sarver, but it was referred to me.

Q. At that time do you recall whether you were personally handling this account with Bruce's Juices, to your best recollection?

A. Off-hand I do not know, unless possibly I got in on the account around about that time.

Q. Do you recall whether or not this was received in the regular course as other mail coming to or referred to your department?

A. It came in the regular mail.

Mr. Allison: Plaintiff offers in evidence the letter identified by the witness and the exhibits attached thereto and referred to therein.

Mr. Fowler: No objection.

Letter dated March 1, 1940, was marked Plaintiff's Exhibit No. 8, 7-23-43, R. W. P.

Q. Did you keep carbon copies of letters written by you to Bruce's Juices in connection with the account?

A. We keep carbon copies of every letter written in our department.

[fol 389] Q. I hand you what purports to be a copy of letter dated March 5, 1940, to Bruce's Juices from American Can Company, and ask if you can identify it.

A. Yes, I wrote that letter.

Q. Did that go out in the usual course of mail?

A. It did.

Mr. Allison: Plaintiff offers in evidence the letter identified by the witness, subject to notice to the defendant to produce the original, if there is objection because the copy offered is a copy and not the original.

Mr. Fowler: Finding the original of this letter in the files which we have here present at this hearing, we have no objection to the exhibit.

Copy of letter dated March 5, 1940, was marked Plaintiff's Exhibit No. 9, 7-23-43, R. W. P.

Q. Mr. Geier, I hand you what purports to be a copy of letter from the American Can Company to Bruce's Juices dated March 11, 1940, and ask you if you can identify that.

A. I do.

Q. Did you write the original of that letter?

A. I did.

Q. Was it sent out in the usual course of mail to the addressee?

A. It was.

Mr. Allison: The plaintiff offers in evidence the copy identified by the witness, subject to the same statement as the prior exhibit.

Mr. Fowler: We have the original in our files at this hearing and we offer no objection to the introduction of this letter at this hearing.

[fol. 390] Copy of letter dated March 11, 1940, was marked Plaintiff's Exhibit No. 10, 7-23-43, R. W. P.

Q. Mr. Geier, Plaintiff's Exhibit 10 just identified acknowledges receipt of a check and two renewal notes, one for $107,784.60 and one for $7,057.05. Were those papers received as stated in the letter?

A. They were.

Q. I hand you what purports to be, copy of letter dated October 15, 1940, from the plaintiff by yourself to Mr. J. Adams Bruce, President of Bruce's Juices, and ask you if you can identify it.

A. That letter was written by me.

Q. Did the original go out in the usual course of mail as the others you have just testified about?

A. It did.

Mr. Allison: Plaintiff offers in evidence the letter identified by the witness subject to the same statement made as to Exhibits 9 and 10.

Mr. Fowler: From a hasty perusal of our files we do not find the original of the letter of which the exhibit purports to be a copy, and therefore will not agree to its going in evidence at this time. But Mr. Bruce will continue to look and if we find the letter in our files we will have no objection to it. Otherwise we are compelled to object that

it purports to be a copy and no foundation for its introduction in evidence has been properly made. I say again that I hope we may be able to find it to save you the trouble.

Q. Mr. Geier, referring to the letter you have just identified, is the original of that letter in your possession?

A. No, it is not.

[fol. 391] Q. Is it in the possession, custody or control of the American Can Company?

A. To the best of my knowledge, no.

Q. I believe you stated that it was forwarded in the regular course of mail?

A. It was.

Q. To the addressee named in the copy?

A. It was, and to the best of my knowledge it has never been returned to us.

Q. From the custom and rules of the American Can Company are letters of that type referred to your department?

A. I do not quite understand.

Q. If the letter had been returned *with* it have been sent to your department?

A. Naturally it would be sent to the party that originally sent the letter.

Mr. Allison: The plaintiff herewith gives the defendant notice to produce the original of the letter referred to by the witness and will offer the letter in evidence in failure of such production at the pre-trial hearing. And in order to preserve the numerical sequence we ask that this letter be marked for identification as Plaintiff's Exhibit No. 11.

Mr. Fowler: We naturally reserve our right to object at the time you offer it in evidence.

Copy of letter dated October 15, 1940, was marked Plaintiff's Exhibit No. 11 for identification, 7-23-43, R. W. P.

Q. Mr. Geier, I hand you what purports to be an original letter from Bruce's Juices to American Can Company dated December 12, 1940, addressed to attention of Mr. A. Geier, and ask you if you can identify it.

A. I do.

[fol. 392] Q. Was that received by you in the usual course of business?

A. It was.

Mr. Allison: Plaintiff offers in evidence the letter identified by the witness as Plaintiff's Exhibit 12.

Mr. Fowler: If you gentlemen will furnish us with a copy of the letter that we have not been able to find, so we may check it against ours, as there was a lot of correspondence in that period, it might expedite us in locating it, because it may have been filed out of date.

Mr. Allison: May I state that at the conclusion of the introduction of these several exhibits I propose to request the privilege of substituting copies as these are permanent records, and if agreeable those copies of all exhibits will be attached and furnished to counsel.

Mr. Fowler: That is all right.

Mr. Allison: Have you your complete correspondence file?

Mr. Fowler: Yes, we believe we have. No objection.

Letter dated December 12, 1940, was marked Plaintiff's Exhibit No. 12, 7-23-43, R. W. P.

Q. I hand you what purports to be a copy of a letter dated December 13, 1940, from American Can Company to Bruce's Juices, having attached thereto a statement and ask you if you can identify it.

A. I do, as being written by me.

Q. Was the original of the statement attached to the letter attached to the original of the letter?

A. It was.

[fol. 393] Q. What did you do with the original letter and statement?

A. They were both mailed to Bruce's Juices on December 13, 1940.

Q. In the usual course of business?

A. In the usual course of business.

Mr. Allison: Plaintiffs offer in evidence the letter identified by the witness, subject to the same statement and conditions as Exhibits 9 and 10.

Mr. Fowler: Finding what appears to be the original of this letter we offer no objection to its introduction at this hearing. I will make this statement, however, that we are, to save time, not checking them too carefully and just trying to identify them, and if we do find there is a discrepancy in what purport to be copies we will naturally raise a question at that time.

Mr. Allison: And produce the originals?

Mr. Fowler: Yes.

Mr. Allison: Very good.

Mr. Fowler: That will save us going over them all.

Copy of letter dated December 13, 1940, was marked Plaintiff's Exhibit 13, 7-23-54, R. W. P.

Q. I hand you what purports to be an original letter from Bruce's Juices to the American Can Company, attention of Mr. A. W. Geier, dated December 16, 1940, and ask you if you can identify it.

A. I do.

Q. Was that received by you in the usual course of mail?

A. It was, and initialed by me.

[fol. 394] Q. I note that there are certain pencil notations on the letter. Who made those notations?

A. That is my writing.

Q. Why were they added?

Mr. Fowler: To which we object as being irrelevant, incompetent and immaterial and no bearing on the issues in the case, elf-serving and other reasons that I do not think of at the moment.

A. The customer when sending in a check covering the interest on the note account made an overpayment of $100, and they asked that this $100 overpayment be applied against the open account charges, and the notation referred to is requesting our treasurer's department to transfer the $100 from the bills receivable record to the accounts receivable, which is the open account.

Mr. Allison: Plaintiff offers in evidence the letter identified by the witness as Plaintiff's Exhibit 14.

Mr. Fowler: To clarify the reference in this exhibit, who is Mr. DoBrocky?.

The Witness: He is in our Tampa, Florida, office.

Mr. Fowler: No objection.

Letter dated December 16, 1940 was marked Plaintiff's Exhibit 14, 7-23-43, R. W. P.

Q. I hand you what purports to be an original letter dated January 17, 1941, from Bruce's Juices to the American Can Company, attention of Mr. A. W. Geier, and signed J. A. Bruce, and ask you if you received that in the usual course of business.

A. I received this letter.

Mr. Allison: Plaintiff offers in evidence the letter identified by the witness as Exhibit 15.

Mr. Fowler: No objection to the introduction of this exhibit at this hearing.

[fol. 395] Letter dated January 17, 1941, was marked Plaintiff's Exhibit No. 15, 7-23-43, R. W. P.

Q. Mr. Geier, I hand you what purports to be an original letter dated October 30, 1941, from Bruce's Juices, addressed to American Can Company, attention of Mr. A. W. Geier, and signed Adams Bruce, and ask you if you received the letter in the usual course of business.

A. I did.

Mr. Allison: Plaintiff asks that the letter just identified by the witness be marked as Plaintiff's Exhibit 16 for identification.

Letter dated October 30, 1941, was marked Plaintiff's Exhibit No. 16 for identification, 7-23-43, R. W. P.

Q. I hand you what purports to be an original letter dated November 1, 1941, from Bruce's Juices, Inc., addressed to American Can Company, Attention Mr. A. W. Geier, and signed by G. P. Peer, and ask you if you received that in the usual course of business?

A. I received this letter.

Mr. Allison: Plaintiff asks that the letter identified by the witness be marked Plaintiff's Exhibit 17 for identification.

Letter dated November 1, 1941 was marked Plaintiff's Exhibit 17 for identification, 7-23-43, R. W. P.

Q. Mr. Geier, you have testified that you were familiar with this account between Bruce's Juices and American Can Company and handled it and knew Mr. Bruce, Mr. Peer, Mr. Eugene Bruce and Mr. Thomas. Have you discussed the account with any of those gentlemen from time to time?

[fol. 396] A. I have.

Q. With which of the named parties have you discussed it?

A. Most of my conversations were with Mr. J. Adams Bruce.

Q. In the time you have been handling the account and been familiar with it, in any of those discussions were any

claims for credits or adjustments made to you or in your presence by Mr. J. Adams Bruce?

A. No.

Q. Has Mr. J. Adams Bruce to you or in your presence made the statement that any controversy existed about the account of Bruce's Juices?

A. I do not recall.

Q. Has he ever stated to you that he had or was having such a controversy with other officials of the American Can Company?

A. He mentioned on a few occasions to me that he had——

Q. Just a moment. Identify the times and places of those occasions as best you can.

A. Well, in my office, I should think in 1941, he had mentioned to me that he had discussed the matter of the claim with one of our other people, but never went into detail with me as to what the claim represented.

Q. Did he name the person with whom he had had such discussion?

A. He referred to Mr. Jenkins.

Q. That is Mr. Leonard D. Jenkins?

A. That is right.

Q. He merely mentioned to you that he had discussed a claim with Mr. Jenkins?

A. That is right.

Q. And he has never made any claim to you?

[fol. 397] A. That is right.

Q. Have you ever had any discussion with Mr. J. Adams Bruce or any of the other parties connected with Bruce's Juices whom you have named concerning the amount of the note indebtedness?

Mr. Fowler: We object to that question unless his answer is limited to yes or no. If he is going to give details of such conversations, unless he identifies the time and place and the person with whom he had it, we object.

Mr. Allison: The question apparently on its face calls for a yes or no answer.

Mr. Fowler: I know, but if this witness volunteers same, counsel will complain bitterly.

Mr. Allison: Counsel can move, if he goes beyond that.

Q. Answer the question.

A. Yes.

Q. With whom were the conversations held?

A. Mr. J. Adams Bruce.

Q. And where were they held?

A. Either *vither* in his office in Tampa, Florida, or our office at 230 Park Avenue, New York.

Q. And when were they held to your best recollection?

A. In October of 1940, in October, 1941. As to the date that we discussed them in New York I do not recall.

Q. What was the conversation or discussion to your best recollection?

Mr. Fowler: To which we object as no particular occasion has been yet identified as to which you asked the witness to testify.

A. The company was owing us a considerable amount of money——

Q. Identify the company.

A. Bruce's Juices were owing us a considerable amount of money and my discussions with Mr. J. Adams Bruce were [fol. 398] in connection with repayment of that account.

Q. During those conversations did Mr. Bruce state to you or complain that Bruce's Juices did not owe the amount standing on the records?

Mr. Fowler: To which we object as being leading, suggestive, and further that no time or place as to the particular conversation is made clear.

A. Never.

Q. On any occasion to you and in your presence during the time you have handled the account of Bruce's Juices for American — Company has Mr. J. Adams Bruce or any of the other named parties with whom you said you had become acquainted on behalf of Bruce's Juices stated to you that the amount of indebtedness represented by the account was in controversy?

A. Never.

Q. Mr. Geier, the defendant in this action, Bruce's Juices, in its fifth and tenth amended pleas has alleged that the notes in suit which you have examined, marked as Plaintiff's Exhibits 4, 5 and 6, at the time the same were delivered—that a controversy existed between the American Can Company and Bruce's Juices regarding adjustments and credits claimed by Bruce's Juices to be due to it by the plaintiff on account of discriminations made against it in

the sale of cans at lower prices to competitors, and that when these exhibits, the three notes, were given by Bruce's Juices to the plaintiff it was upon the prior expressed condition and understanding between Bruce's Juices and the American Can Company that the notes would be paid when and at the time such adjustments were made, and that they would not be paid until such adjustments were made, and that the American Can Company received the notes under such understanding and agreement and at the time of receiving the notes the American Can Company agreed to the conditions alleged and further agreed that the notes should [fol. 399] not become due until such adjustments as alleged were made, and that the American Can Company further agreed that the notes were never to be paid by Bruce's Juices unless the adjustments should be made and that such adjustments were never made. Mr. Geier, in your position with the American Can Company have you any information or knowledge concerning those allegations and the condition and understanding described therein?

A. Very definitely no.

Q. In your handling of the account and in your conversations over the period of time you have covered in your testimony, with Mr. J. Adams Bruce, Mr. Thomas, Mr. Peer and Mr. Gene Bruce, has any of the matter I have stated as being contained in the pleas been brought to your attention by those gentlemen?

A. No, sir.

Q. Do you have any information or knowledge that any other officer or official of the American Can Company knew of or agreed to such conditions as I have stated?

A. I have not.

Q. When the notes in suit, Plaintiff's Exhibits 4, 5 and 6, and any other notes prior to those of which these might be renewals were given, has any such statement been made to you by Bruce's Juices or any of its officers or agents?

A. No.

Q. On behalf of the American Can Company have you ever entered into any such agreement as that which I stated to you was contained in these two pleas?

A. Very definitely no.

Mr. Allison: The plaintiff requests the privilege of substituting true copies for Exhibits Nos. 8 to 17. You may inquire.

[fol. 400] Cross-examination.

By Mr. Fowler:

Q. Mr. Geier, in reference to the purported copy of letter dated October 15, 1940, which you stated was mailed to Bruce's Juices or J. Adams Bruce and intended for Bruce's Juices and signed by you, did you ever receive what purported to be a reply to that letter from Bruce's Juices or from Mr. J. Adams Bruce?

The Witness: May I see that letter?

Mr. Callahan: The witness is reading Exhibit 11 for identification.

A. I cannot say without consulting our files.

Q. Well, will you consult your files and tell us whether you ever did receive a letter which purported to be a reply to that particular letter?

Mr. Allison: In response to the question counsel for plaintiff states that he has in Tampa certain of the correspondence files and will search the same and if there is found therein any letter indicating or referring to the receipt of Exhibit 11, copies will be furnished to counsel for the defendant.

Mr. Fowler: Am I to infer from that, that counsel and the witness have searched your records here in New York and not found any letter which purports to be a reply?

Mr. Allison: We are in possession here of a portion of the file and it is not in the portion we have, but there are other files which might contain such a reference.

Mr. Fowler: So far as your files show here you have not received a reply?

Mr. Allison: In the same fashion that Mr. Bruce's file which you stated he has here does not show the original of the letter in question.

[fol. 401] Mr. Fowler: Of course our contention is that we have no record of receiving it. Well, I will ask the witness.

Q. You have looked at your files and not found any letter in your files here that indicates that a reply to that Exhibit 11 was received?

A. That is right, but the letter does not require a reply.

Q. Then I repeat the question: have you found any letters here that indicate that it is an answer to that letter?

A. In the files that are available, no.

Q. Now I refer you to the exhibit which is marked Plaintiff's Exhibit 12 which I now hand you and I note in this exhibit, which is a letter from Bruce's Juices by Mr. Peer to American Can Company your attention, dated December 12, that it states, "We regret very much delay in getting these checks to you, but due to some unknown reason the letters were never received in this office." With your knowledge of the correspondence does that refer to this letter in question or does it refer to some other letter?

Mr. Allison: Counsel for plaintiff offers the observation that it is strange the letter tendered the witness can refer to others stating that they are not received and still reply to those letters. Go ahead and answer it.

Mr. Fowler: For the purpose of getting your own exhibits straightened out, there must be other letters between those points.

Mr. Allison: The record shows that the question refers to Exhibit 12.

A. I do not believe that the letter of October 15, 1942, was referred to in this letter of December 12, 1940.

Q. During these years regarding which you have testified you had a great many conferences with Mr. J. Adams Bruce, did you not?

[fol. 402] A. I would not say a great many. I had several.

Q. You had some of them here in New York and some of them in Tampa, Florida?

A. That is right.

Q. The ones you had in Tampa, Florida, were annually about October, were they not?

A. That is right.

Q. How many other conferences would you say you had with Mr. Bruce on an average a year?

A. Oh, one or two a year.

Q. Only one or two a year?

A. Conferences about his indebtedness to us. He would stop into the offices for a friendly visit and the account would not be discussed.

Q. Well, would he do that often?

A. Not very often.

Q. Then you do not know how many times you could say you saw him in 1939?

A. I do not believe I saw Mr. Bruce in 1939.

Q. How many times would you say you saw him in 1940?

A. I would say once, possibly twice.

Q. How many times in 1941?

A. Three or four.

Q. And in 1942?

A. About four.

Q. When did you say it was that he told you he had had a claim against the American Can Company which he had discussed with Mr. Jenkins?

A. I believe in 1941.

Q. You do not remember now whether it was 1941 or not?

[fol. 403] A. Not definitely.

Q. It is hard to identify what conversations you had after this length of time, that you had on any particular occasion, is it not?

A. No.

Q. You just don't remember this particular one?

A. I do not remember the time.

Q. I mean the time of it. Do you remember whether or not he told you at that time he had discussed this claim he had against the American Can Company with anyone else besides Mr. Jenkins?

A. I don't believe he mentioned anyone else.

Q. He might have?

A. I don't know.

Q. You would not say he did not, though?

A. To the best of my knowledge he did not.

Q. As you remember it now he did, not, is that correct?

A. To the best of my knowledge, yes.

Q. Now I may be wrong in this, but as I recall your testimony you said he never mentioned any discriminations to you?

A. That is right, I did.

Q. You never heard him mention any discriminations to you?

A. That is right.

Q. At any time?

A. That is right.

Q. You feel pretty sure about that?

A. Yes.

Q. Were you present in 1942 in your office when Mr. Howry was present and talked to Mr. Bruce?

A. Yes.

Q. Was any discrimination mentioned by Mr. Bruce at that time?

[fol.404] A. I do not recall any discrimination being mentioned.

Q. You would not say there were not discriminations mentioned by Mr. Bruce at that time, would you?

Mr. Allison: Objected to unless it is confined to a period of time that the witness may have been present at such conference.

Mr. Fowler: He said he was present.

Mr. Allison: I know, but he did not say he was present during the whole conversation and it might have been mentioned when he was not present.

Q. When you were not present of course don't say what happened, but was the question of discrimination mentioned to Mr. Howry while you were present?

A. No.

Q. Were you present when Mr. Bruce came in?

A. Yes.

Q. Were you present when Mr. Bruce went out?

A. I was.

Q. Did you go out during that period?

A. I believe I had occasion to go out on several occasions while Mr. Bruce was in the office.

Q. That was a conference arranged for you or the credit department to have with Mr. Bruce about his affairs?

A. About his indebtedness to us, yes.

Q. That was an arranged conference, in other words what we would call your conference, your business?

A. That is right.

Q. And Mr. Howry was just there to assist you in the conference on account of his knowledge of the business with Mr. Bruce?

A. Mr. Howry was there hoping to obtain a contract from Mr. Bruce.

[fol. 405] Q. The American Can Company had a contract with Mr. Bruce, didn't they?

A. That is right.

Q. Mr. Howry was with the American Can Company at that time?

A. That is right.

Q. When was that conference held?

A. I believe in April of 1942.

Q. Did Mr. Bruce at that time make the statement that he had a claim against the American Can Company?

A. He did mention a claim at that meeting.

Q. Did he state with whom he had discussed that claim, what officers or representatives or officials of the American Can Company he had discussed that claim?

A. He had discussed it with Mr. Jenkins.

Q. Do you know whether or not he mentioned he discussed it with anyone else?

A. He had not said anything to me about it.

Q. Then you did know that there was a controversy existing between Mr. Bruce and the American Can Company?

Mr. Allison: I object to that as it calls for a legal conclusion, what was the effect of the statement that the witness has testified was made by Mr. J. Adams Bruce.

A. I did not know of any controversy outside of what Mr. Bruce had said about discussing a claim with Mr. Jenkins.

Q. You knew there was a disagreement between the American Can Company and Mr. Bruce regarding the account, didn't you?

Mr Allison: Objected to as to form, as it assumes facts not testified to by the witness and calls for a conclusion, and on the further ground that it takes two parties to make a disagreement.

[fol. 406] Mr. Fowler: I think the court will know that

A. No, I did not.

Q. You knew that Mr. Bruce was making claim for something which you did not acknowledge and yet you did not know there was a disagreement?

A. I did not have any knowledge of it outside of what Mr. Bruce had said. Whether there existed in those discussions that he claims to have had, I did not have any knowledge of it.

Q. After he had made the statement to you about his claims didn't you know there was a disagreement?

Mr. Allison: Objected to as argumentative, repetitious and calling for the conclusion of the witness and it has been heretofore definitely answered by the witness.

A. No.

Q. And you are quite sure he never mentioned the word discriminations while you were there?

A. That is right.

Q. How long was he in your office?

A. About an hour, I would say.

Q. Anyone else there besides Mr. Howry and Mr. Bruce?

A. Mr. Jenkins.

Q. Mr. Jenkins was there also?

A. Yes.

Q. And he mentioned a claim that he had against the American Can Company and mentioned that he had been discussing it with Mr. Jenkins?

A. That is right.

Q. Just what did he say?

A. He claimed that there was some moneys due him for some claims that had been previously discussed with, referring to Mr. Jenkins, and as I recall there was not any discussion about the claim.

[fol. 407] Mr. Fowler: That is all.

Redirect examination.

By Mr. Allison:

Q. One question, Mr. Geier. In answer to the defendant's question you stated that Mr. Howry was present because he wanted a contract with Bruce's Juices and that there then existed a contract. What do you mean when you say he wanted a contract?

A. Bruce's Juices' contract expired on December 31, 1942, and all of our sales people had gone out earlier in 1942 to renew the contracts that were expiring in December of 1942, and Mr. Howry hearing that Mr. Bruce was coming into our office thought it would be an opportune time to try and get him to sign a renewal contract.

Mr. Allison: That is all.

Mr. Fowler: I think that is all. Let the record show at this time we think of no more questions to ask this witness on cross examination. However, other questions may suggest themselves and if they do Mr. Geier having announced that he is here available in this office, we shall call upon counsel to produce him and ask other questions, subject of course to the objections of counsel for the American Can Company.

Mr. Allison: Plaintiff has no objection to counsel for the defendant calling Mr. Geier as his witness at any time.

Mr. Fowler: I am pleased and amazed. Mr. Callahan, do you agree with that statement?

Mr. Callahan: I have no objection to your calling him as your own witness.

Mr. Fowler: Well, Mr. Allison states he has no objection to our calling him as our own witness.

[fol. 408] Mr. Callahan: As Bruce's Juices' witness.

Mr. Fowler: If we wish him we will call him and let the objections be made.

Andrew W. Geier.

Subscribed and sworn to before me this 8th day of August, 1943, Rowland W. Philips, Notary Public, Nassau County 1291, N. Y. Co. Clk. No. 432. Commission Expires March 30, 1944.

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James E. Sarver, called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Allison:

Q. Will you state your home address?

A. 7 Ridgecrest East, Scarsdale, New York.

Q. Mr. Sarver, what is your position with the American Can Company, the plaintiff in this action?

A. General credit manager.

Q. How long have you occupied such position continuously to this time?

A. Since August 15, 1938.

Q. Prior to that time were you connected with the company?

A. Yes, sir.

Q. In what capacity?

A. Assistant manager of the company's operation in Utah.

Q. How long have you been connected with the American Can Company?

A. Since 1907.

Q. That has been continuous?

A. Continuous.

[fol. 409] Q. Mr. Sarver, in your position with this company have you come in contact with Bruce's Juices, Incorporated, of Tampa, Florida?

A. I am personally acquainted with Mr. Bruce.

Q. Do you know whether Bruce's Juices, Incorporated, has any relationship with the American Can Company?

A. I know that they were a customer of the American Can Company.

Q. Do you know Mr. J. Adams Bruce, the gentleman present in this room?

A. Yes, sir.

Q. Have you in your contact with the company met any other parties who were presented to you as officials or employees of the company?

A. I met Mr. Smalle and possibly one or two others. I do not recall their names at the present time.

Q. Has the account of Bruce's Juices been handled in your department?

A. So far as the credit is concerned, yes.

Q. When you refer to credit, just what do you mean?

A. I mean the amount of credit that we extend them on their can purchases.

Q. Does your department handle collections?

A. All collections; that is, we supervise all collections.

Q. So far as you know has your department handled all collections from Bruce's Juices?

A. So far as I know. I possibly should qualify that to the extent that any notes that we might take, the collection of those is handled by our treasurer or his department.

[fol. 410] Q. Have you had occasion during the existence of customer relationship to correspond with Bruce's Juices?

A. Yes.

Q. Have you retained copies of letters written by you to the company?

A. Yes, sir.

Q. I hand you what purports to be a copy of letter dated November 30, 1939, addressed to Bruce's Juices, Incorporated, Tampa, Florida, Attention Mr. J. Adams Bruce, and ask you if you can identify it.

A. That is right.

Q. That is a copy of a letter written by you?

A. Yes, sir.

of customer relationship to correspond with Bruce's Juices?

Q. Do you know what happened to the original of the letter?

A. I assume Mr. Bruce received it.

Q. What did you do with it?

A. I mailed it.

A. Yes, sir.

Q. You do not have the original in your custody or control?

A. No, sir.

Mr. Allison: Plaintiff offers in evidence as Plaintiff's Exhibit 18 the letter identified by the witness subject, if required, to notice to the defendant to produce the original.

Mr. Fowler: No objection to the letter being introduced in evidence at this time for this hearing.

Copy of letter dated November 30, 1939, was marked Plaintiff's Exhibit No. 18, 7-23-43, R. W. P.

[fol. 411] Q. Mr. Sarver, I hand you what purports to be a copy of letter dated February 2, 1940, addressed to Bruce's Juices, Inc., Attention Mr. J. Adams Bruce, from General Credit Manager, referring to statement attached consisting of two pages, and ask you if you can identify the same.

A. That is my letter.

Q. I hand you what purports to be original letter dated February 6, 1940, from Bruce's Juices, Inc., signed G. P. Peer, addressed to American Can Company, Attention Mr. J. E. Sarver, and ask you if you can identify that letter.

A. The letter came into our department, yes.

Q. And does that refer to the letter I handed you just prior thereto dated February 2?

A. That is right.

Mr. Allison: Plaintiff offers in evidence the two letters identified by the witness, and asks that the letters and exhibits consisting of four sheets all be marked as Plaintiff's Exhibit 19. For convenience in numbering the exhibit we ask that the original letter be marked Exhibit 19-A, the yellow carbon copy 19-B, the first sheet of the statement 19-C, and the second sheet of the statement 19-D.

Mr. Fowler: No objection to the introduction of these exhibits at this time for this hearing.

The papers were marked respectively Plaintiff's Exhibits Nos. 19-A, 19-B, 19-C and 19-D, 7-23-43, R. W. P.

Recess taken until 2 P. M.

[fol. 412] AFTER RECESS

Continuation of the direct examination of JAMES E. SARVER.

By Mr. Allison:

Q. I hands you what purports to be a carbon copy of letter dated February 27, 1940, addressed to Bruce's Juices, Incorporated, from the American Can Company, and ask you if you can identify it.

A. Yes, sir, this is my letter.

Q. What did you do with the original of the letter?

A. Mailed it to Mr. Bruce.

Q. You do not have the original in your custody or control?

A. No, sir.

Mr. Allison: I offer the letter identified by the witness in evidence.

Mr. Fowler: We have no objection to the offer of this letter at this time for the purpose of this hearing.

Copy of letter dated February 27, 1940, was marked Plaintiff's Exhibit No. 20, 7-23-43, R. W. P.

Q. Mr. Sarver, I hand you what purports to be a copy of a letter dated April 8, 1940, addressed to Mr. J. Adams Bruce, President Bruce's Juices, with an attached list, and ask you if you can identify it.

A. Yes, sir; that is my letter.

Q. What became of the original?

A. It was mailed to Mr. Bruce.

Q. You do not have the original in your custody or control?

[fol. 413] A. No.

Mr. Allison: I offer in evidence as Plaintiff's Exhibit 21 this letter identified by the witness.

Mr. Fowler: We have no objection to the introduction on this exhibit at this time for the purpose of this hearing.

Letter dated April 8, 1940, was marked Plaintiff's Exhibit No. 21, 7-23-43, R. W. P.

Q. Mr. Sarver, I hand you what purports to be a copy of a letter to Mr. J. Adams Bruce, President of Bruce's

Juices, from the General Credit Manager, dated April 22, 1940, and ask you if you can identify it.

A. Yes, sir.

Q. What did you do with original of this letter?

A. Mailed that to Mr. Bruce.

Mr. Allison: I offer the letter identified by the witness in evidence as Plaintiff's Exhibit 22.

Mr. Fowler: I have no objection to the introduction of this letter as an exhibit at this time for the purpose of this hearing.

Copy of letter dated April 22, 1940, was marked Plaintiff's Exhibit 22, 7-23-43, R. W. P.

Q. I hand you what purports to be an original letter dated April 25, 1940, from Bruce's Juices signed G. P. Peer, to the American Can Company, attention of Mr. J. E. Sarver, and ask you if you can identify it.

A. Yes, sir.

Q. That was received by you?

A. Yes, sir.

Mr. Allison: I offer the letter identified by the witness as Plaintiff's Exhibit 23.

[fol. 414] Mr. Fowler: No objection to the introduction of the exhibit at this time for the purpose of this hearing.

Letter dated April 25, 1940, was marked Plaintiff's Exhibit No. 23, 7-23-43, R. W. P.

Mr. Allison: At this time counsel makes the same request, that true copies may be substituted for the several exhibits identified by this witness numbered 18 through 23.

Mr. Fowler: I have no objection.

Q. Mr. Sarver, I hand you Plaintiff's Exhibit 22 and call your attention to the last sentence in paragraph 1 which relates to a conversation between Mr. Bruce and Mr. Nugent and Mr. Jenkins. Were you present at that conversation?

A. No, sir.

Q. Were you advised of the conversation being held?

A. By Mr. Bruce.

Q. By Mr. Bruce?

A. Yes.

Q. Did he state to you the subject of the conversation?

A. No, sir.

Q. When and where did he make the statement to you?

A. In my office.

Q. About what date?

A. April 19th.

Q. Did he state to you what his conversation was about with Messrs. Nugent and Jenkins?

A. Only that it had reference to a claim that he had discussed with them.

Q. A claim?

A. Yes, sir.

Q. Did he state the nature of the claim?

[fol. 415] A. He did not.

Q. Did he state the amount of the claim?

A. He did not,

Q. Did you have any conversation with him about the claim?

A. Nothing other than that I told Mr. Bruce that if and when the claim had been decided and it was decided that any credit was due him, the credit would be applied against the principal of his notes.

Q. Was it your position to have anything to do with the determination of the claim?

Mr. Fowler. To which we object as being incompetent, irrelevant and immaterial. What his position was on the matter is a question of fact. That is simply a conclusion of his intention or motive.

A. No.

Q. What department would pass upon a matter of that kind if yours did not?

A. The sales department.

Q. In other words you would have received notice of the disposition or decision and acted accordingly?

Mr. Fowler: To which we object as being a self-serving declaration, leading and suggestive and incompetent.

A. We would have received notice from the sales department.

Q. Is that the customary method of handling such matters in this company?

A. It is.

Q. Mr. Sarver, did you personally ever have any conversation with Mr. Bruce regarding any claim for credit or

adjustment relating to this amount with the company?

[fol. 416] A. No, sir.

Q. Did Mr. Bruce ever make any statement to your or in your presence claiming that he had been discriminated against and that some adjustment or credit was due his account?

A. No, sir.

Q. In connection with Exhibit 22, the letter of April 22, 1940, referring to the matter discussed with Messrs. Nugent and Jenkins, you have stated that Mr. Nugent advised you that Mr. Bruce had discussed a claim with him. Was any other matter mentioned to you by Mr. Bruce in relation to the subject of that letter?

A. No, sir.

Q. Were the renewal notes referred to in Exhibit 22 delivered to the American Can Company?

A. They were.

Q. They were notes signed by Bruce's Juices?

A. Signed by Bruce's Juices.

Q. Mr. Sarver, in your position and in your department during the existence of the account of Bruce's Juices were any controversies between the customer, Bruce's Juices and the company brought to your attention?

A. No, sir.

Q. You have testified that Mr. Bruce stated to you that he had discussed a claim with Messrs. Nugent and Jenkins. From Mr. Bruce or any of your fellow employees or officials of American Can Company was any other claim on the part of Bruce's Juices brought to your attention?

A. No, sir.

Q. At any time?

A. No, sir.

Q. Did you personally ever have a controversy with Mr. J. Adams Bruce concerning his account with the American Can Company?

[fol. 417] A. No controversy. We have discussed his account.

Q. Well, in discussing the account what did you discuss?

Mr. Fowler: We object unless he identifies at least some time or some place or approximately the time.

A. The answer to that would be no.

Q. I asked you what you discussed, Mr. Sarver, the subject matter.

A. Oh. Well, we discussed the amount of his notes and the amount of credit that we would extend and on what basis it would be extended.

Q. In other words, your discussions with him concerning his account related to the amount of credit and the payment and collection of the account?

Mr. Fowler: To which we object as leading, as testifying and putting the answer in the mouth of the witness. He is a very intelligent witness and does not need to be instructed or coached at this time.

A. Yes.

Q. Mr. Sarver, in this action the defendant Bruce's Juices, Incorporated, in the fifth and tenth amended pleas alleges that the three notes which are Plaintiff's Exhibits 4, 5 and 6 respectively, at the time the same were made and delivered, there existed a controversy between the American Can Company and Bruce's Juices, hereinafter referred to as Can Company and Bruce for brevity, regarding certain adjustments and credits claimed by Bruce to be due on account of discrimination by the Can Company in the sale of cans and other matters and by selling cans at lower prices to competitors than to Bruce, and that at the Can Company's request the three notes in suit were delivered as evidence [fol. 418] of the amount due to the plaintiff, and that these notes were given by Bruce to the Can Company on the express prior condition and understanding between the Can Company and Bruce that the notes would be paid when and if these adjustments were made and that they would not be paid if the adjustments were not made and that the Can Company received these notes under such an agreement and understanding, and at the time the Can Company received the notes they agreed to those conditions and further agreed with Bruce that the notes should not become due until the adjustments were made, and that the Can Company further agreed that the notes were never to be paid by Bruce unless the adjustments should be made, and that if the adjustments were never made the notes were to be void and of no effect. In your position with the credit department have you any knowledge or information concerning such a condition or understanding?

A. No.

Q. Did you on behalf of the American Can Company enter

into such an agreement or understanding with Bruce's Juices?

Mr. Fowler: To which we object because the agreement and understanding referred to could only be in writing and if in writing the writing is the best evidence, or if oral, it is contained in a conversation and the witness has not been asked to give the substance of the conversation but to give his opinion as to the legal effect of some conversation, and therefore, an answer to that question is incompetent, and irrelevant.

Mr. Allison: To which counsel for the plaintiff notes grounds 12 and 13 of the motion and demurrer to the pleas, complaining of the fact that no name of any agent or representative of the plaintiff is set forth in connection with such [fol. 419] understanding or agreement, nor does the plea itself set forth whether such agreement or understanding was verbal or written and pursuant to the pre-trial conference order this witness is being interrogated on the point in question.

A. No.

Q. I tender to you Plaintiff's Exhibits 4, 5 and 6 and ask you if those notes were handled through your department of the American Can Company?

A. Yes, sir.

Q. Were they received through your department? Is that the usual course?

A. Those notes would likely have been mailed direct to our treasury department and they send them up to our department for approval.

Q. In connection with the receipt of these or any other notes from Bruce's Juices to your knowledge has there been any instruction or condition concerning the notes?

Mr. Fowler: To which we object as calling for opinion evidence or evidence that may be based upon hearsay and it calls for the conclusion of the witness.

A. My answer is no.

Q. During the existence of the account did you discuss with Mr Bruce notes given by Bruce's Juices to the American Can Company?

A. Yes, sir.

Q. During any of those conversations with Mr. Bruce did he make any statement concerning the delivery of any of the notes?

A. No, sir.

Q. Were any of the notes which you discussed with him or received from Bruce's Juices delivered to the American Can Company to your knowledge subject to any conditions?

A. No, sir.

[fol. 420] Were the notes in suit delivered and handled in your department in the same condition as other similar evidence of indebtedness?

A. Exactly.

Q. Was there anything in this transaction to distinguish it from other similar transactions with other customers?

A. No.

Mr. Allison: You may examine.

Cross-examination.

By Mr. Fowler:

Q. What are the duties of your department again, please, Mr. Sarver?

A. We pass on all credit extended to purchasers of our product and handle the collection of our accounts.

Q. The notes I believe you said were the particular problem of the department of which your treasurer is head?

A. That is right.

Q. That is a different department than yours?

A. Yes, sir.

Q. Now have you the authority in your department to accept a lesser amount for an indebtedness due than the amount called for by any evidence of indebtedness?

A. No, sir.

Q. What department has the authority to authorize the acceptance of a lesser amount in satisfaction of some indebtedness due the American Can Company?

A. That would have to be passed on by some of the officials of our company.

Q. Does the sales department have any of that type of work to do?

A. The sales department can recommend.

[fol. 421] Q. It is not even your duty to recommend reductions?

A. We have nothing to do with any claims or adjustments. That is out of our province.

Q. It is the duty of the sales department to go into the question of claims or demands of the customers and either allow them or make recommendations, is not that true?

A. That is true.

Q. That is Mr. Nugent's department?

A. Yes.

Q. Now I believe you stated you were not present at the meeting of Mr. Bruce with Mr. Nugent and Mr. Jenkins?

A. I was not.

Q. Therefore, not being present, you naturally do not know of your own knowledge what was said or done there, do you?

A. No, sir.

Q. Did you or did you not—I am a little confused—state that Mr. Nugent has mentioned the fact to you that Mr. Bruce had a claim or was making a claim or something of that nature?

A. He told me——

Q. I am just asking you *did your* did you not testify to that?

A. Yes.

Q. You said he had mentioned it to you?

A. Yes.

Q. And I believe you stated that Mr. Bruce mentioned to you also that he had discussed a claim? I believe that was the word you used, with Mr. Jenkins and Mr. Nugent?

A. Yes, sir.

Q. You did not go into the details of that with Mr. Bruce, I believe you said?

A. That is right.

[fol. 422] Q. As the result of the conference you did have with Mr. Bruce you wrote him this letter of April 22nd, 1940, which is your Exhibit 22, is that correct?

A. That is correct.

Q. I will not ask you for the substance of any conversation but whether or not you did have a conversation with Mr. Nugent and Mr. Jenkins after talking with Mr. Bruce and before writing this letter. Did you or did you not have a conversation?

A. Yes.

Q. Was anybody present when you had your conversation with Mr. Bruce?

A. There was only Mr. Bruce and myself in my office, as I recall it.

Q. Will you think about that a moment to refresh your memory and see if you are reasonably convinced that that is the fact?

A. I am positive that that is the fact.

Q. The only time that you discussed any claim with Mr. Bruce against the American Can Company was on this one occasion which I believe you stated was on April 19, 1940, is that correct?

A. That is right.

Q. Mr. Geier is your assistant, is he not?

A. Yes.

Q. And has been for a few years back?

A. Ever since I have been here.

Q. Now, Mr. Geier had a good deal to do with the handling of this account of Mr. Bruce's did he not?

A. He did.

Q. And it was not necessary for Mr. Bruce to see both you and Mr. Geier, was it?

A. No, it was not.

[fol. 423] Q. One of you was sufficient for your department?

A. That is right.

Q. Do you recall the last time you did talk with Mr. Bruce prior to this hearing here?

A. You mean about his account?

Q. No, just talk to him at all, except maybe to say hello or something like that, to talk any business with him at all?

A. I do not recall personally talking any business with Mr. Bruce after that, although I might have. I don't know.

Q. So far as your recollection goes you did not talk to Mr. Bruce after that at all?

A. Other than to——

Q. I understand, not socially, but on business.

A. I do not recall. I might have.

Q. As you recall that was all handled in your department with Mr. Bruce by Mr. Geier?

A. That is right.

Q. You have seen Mr. Bruce in your office after that time?

A. Yes, sir.

Q. Just once more as to whom you talked with. At the time you talked to Mr. Nugent and Mr. Jenkins regarding this matter was any other person present as you recall?

A. No.

Mr. Fowler: That is all. This hearing being pursuant to a notice for the taking of the testimony of these witnesses for a pre-trial conference the defendant is restricting his examination to matters which he thinks will be pertinent to such pre-trial conference.

Mr. Allison: Plaintiff will restrict it to the points raised by the notice.

James E. Sarver.

Subscribed and sworn to before me this 6th day of August, 1943. Rowland W. Phillips, Notary Public, Nassau County 1291, N. Y. Co. Clk No. 432, Commission expires March 30, 1944.

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[fol. 424] Allen Herbert Nugent, called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Allison:

Q. Mr. Nugent, you testified in a hearing in this proceeding in these offices of April 1 and 2, 1943, did you not?

A. I did.

Q. And in that record your position with the company and your years of employment were covered I believe in some detail?

A. That is correct.

Q. Your title is what?

A. General manager of sales, packers' cans.

Q. And you have already testified that you know Bruce's Juices, Incorporated, and Mr. J. Adams Bruce?

A. That is correct.

Q. What was the relationship of Bruce's Juices, Incorporated, to the American Can Company during your acquaintance with the firm or Juice Company?

A. A customer of ours.

Q. Did you meet any other employees or officials of Bruce's Juices who were presented to you as such?

A. Mr. Ed Smalle and Mr. Bruce's nephew, I cannot recall his first name right now, but his name was Bruce.

Q. Did you meet a Mr. Peer?

A. No.

Q. Have you had any conversations regarding the account of Bruce's Juices with all of the gentlemen you have named?

A. Only with Mr. Bruce.

Q. In other words your conversations concerning the account of Bruce's Juices were entirely with Mr. J. Adams Bruce?

A. That is correct.

[fol. 425] Mr. Nugent, in your conversations with Mr. Bruce was mention made by him of any claim against the American Can Company?

A. There was one instance of that kind.

Q. Do you recall the time and place?

A. I think it was in the early part of April, 1940, in this office.

Q. Who was present at that time if you recall?

A. I do not recall unless it was Mr. Jenkins.

Q. And yourself and Mr. Bruce?

A. That is correct.

Q. And at that time was any claim made?

A. It was merely mentioned.

Q. Who mentioned it?

A. Mr. Bruce.

Q. Was the subject of the claim mentioned?

A. It was, yes.

Q. Please state the conversation in connection with the claim as you best recall it?

A. As I recall, Mr. Bruce stated that we owed him something like $4800, representing some trucking charges on cans taken from our Tampa factory up until that time. And I——

Q. Cans taken from your Tampa factory to what point?

A. To Mr. Bruce's factory.

Q. Go ahead.

A. I explained to Mr. Bruce our policy in regard to taking cans by truck out of the Tampa factory and told him that we could not allow his claim of $4800.

Q. I believe you testified that that was the only claim that was ever mentioned to you by Mr. Bruce?

A. Yes, sir, that is correct.

Q. In your department and in your connection with the account of Bruce's Juices, did you come in contact with promissory notes?

[fol. 426] A. I did not.

Q. Prior to and at the time of the conversation you have described in April, 1942, to your knowledge was there any controversy between Bruce's Juices, yourself or any other officials of the American Can Company in connection with the account of Bruce's Juices with the Can Company?

A. You mentioned 1942?

Q. Yes.

A. This discussion was in 1940.

Q. In 1940, I beg your pardon. I will have to reframe the question then to make it a little more general. To your knowledge during the handling of the account until April of 1942 was there any controversy between yourself and Mr. Bruce or any other officials of the American Can Company involving claims for credits or adjustments by Bruce's Juices in its account?

A. No, sir.

Q. Mr. Nugent, in the fifth and tenth amended pleas of the defendant Bruce's Juices in this action involving three promissory notes, Plaintiff's Exhibits 4, 5 and 6 respectively, the defendant alleges that at the time these exhibits were made and delivered to the American Can Company there existed a controversy between Bruce's Juices and the Can Company regarding adjustments and credits claimed by Bruce's Juices to be due on account of discriminations in the sale of cans at lower prices to the defendant's competitors and that at the request of the American Can Company these notes were delivered as evidence of the amount due. They were delivered on the express prior condition and understanding between the American Can Company and Bruce's Juices that these notes would be paid when and at the time such adjustments were made and the notes would not be paid until the adjustments were made and that the American Can Company received the notes [fol. 427] under such an agreement and understanding, and at that time agreed to those conditions and the American Can Company further agreed with Bruce's Juices that the notes should not become due until such adjustments were made and they were never to be paid by Bruce's Juices unless the adjustments were made. In your position with the company have you any knowledge of any such condition or understanding?

A. No, sir.

Q. In your position with the company have you ever entered into any such condition or understanding with Bruce's Juices?

A. No, sir.

Q. Did you ever enter into any such agreement or understanding as stated in the plea I have recited to you?

A. No, sir.

Q. To your knowledge did any other representative, official or employee of the American Can Company enter into such an agreement?

A. No, sir.

Mr. Allison: You may inquire.

Cross-examination.

By Mr. Fowler:

Q. What are your duties, Mr. Nugent, in your official position with the American Can Company?

A. I am general manager of sales, packers' cans.

Q. That is your title, but what are your duties under that title?

A. Directing the sales.

Q. Well, do you go out and see your factories of the American Can Company?

A. Very, very seldom.

[fol. 428] Q. You stay right here in New York and direct the sales from here?

A. Most of the time.

Q. You do have charge of claims that arise with your customers?

A. Yes, that is correct.

Q. As I understand your testimony a few moments ago on direct you stated that you knew of no claim that Mr. Bruce had made against the American Can Company except this one for some $4800 for transportation which you state he made at a meeting between yourself, Mr. Bruce and Mr. Jenkins in April, 1940. Is that your testimony?

Mr. Allison: I object. The witness testified up until April, 1942 as to claims, not thereafter.

Q. O. K. Limit your answer to April, 1942.

A. That is the only claim.

Q. That is the only claim that you knew anything about Mr. Bruce making against the American Can Company?

A. Yes, sir.

Q. You knew nothing about any claim of discrimination that he had made either, did you?

A. Not discrimination, no.

Q. You did not know anything about that either?

A. No, because there was not any such thing.

Q. Well, I am asking you whether he ever made any claim to you of discrimination or whether you knew anything about it.

A. No, sir.

Q. When he talked to you with Mr. Jenkins in the early part of 1940 he made a claim I believe you stated for some $4800 for transportation in connection with cans delivered by American Can Company to Bruce's Juices in Tampa, Florida, is that correct?

[fol. 429] The Witness: Will you read the question?

Q. The question is is not that what you testified to a little while ago?

A. No.

Q. What did you testify regarding the claim that he made in the early part of April, 1940, when you and Mr. Jenkins were present?

A. It was merely a controversy of the truck charges on cans from our Tampa factory to Mr. Bruce's factory and nothing was said in regard to the American Can Company delivering the cans or anything to that effect.

Q. Well, the amount that he claimed at that time as you state was some $4800?

A. To the best of my memory that was the figure.

Q. And didn't you state that you explained to Mr. Bruce that you could not allow that claim?

A. I did.

Q. And turned him down?

A. That is correct.

Q. And that closed the matter as regards that claim?

A. As far as I was concerned that closed it.

Q. Did he explain to you why he thought this claim should be granted?

A. He had reasons of his own which he felt he should be entitled to that, yes.

Q. And the date you used on that was up until April, 1942?

A. In my answer——

Q. To Mr. Allison.

A. To Mr. Allison.

[fol. 430] Mr. Fowler: That is all.

Allen Herbert Nugent.

Subscribed and sworn to before me this 6th day of August 1943. Rowland W. Philips.

Rowland W. Philips, Notary Public, Nassau County 1291. N. Y. Co. Clk. No. 432. Commission expires March 30, 1944.

Mr. Callahan: Depositions closed.

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In the Circuit Court, Hillsborough County, Florida, 13th Judicial District

No. 23454—Law Civil Action, Damages $50,000

American Can Company, a New Jersey Corporation, Plaintiff,

vs.

Bruce's Juices, Inc., a Florida Corporation, Defendant

State of New York,
County of New York; ss:

I, Rowland W. Philips, a Notary Public of the State of New York, County of Nassau (with certificate filed in New York County and authorized to administer oaths), hereby certify that Henry L. Synder, R. M. Roberts, Leonard D. Jenkins, Hamilton Hubbard Howry, Andrew W. Geier, James E. Sarver and Allen Herbert Nugent, the witnesses who testimony was taken pursuant to notice dated July [fol. 431] 10, 1943, were duly sworn by me to tell the truth, the whole truth and nothing but the truth in the above captioned action, and that foregoing pages 1 to 151, both inclusive, are a true record of the testimony given by the said witnesses.

I further certify that the said witnesses after having read their testimony signed the same and swore to the correctness of it before me.

I further certify that I am not a relative or employee or attorney or counsel of any of the parties or a relative or employee of such attorney or counsel and that I am not financially interested in the action.

Witness my hand and seal at New York City this 12 day of August, 1943.

Rowland W. Philips.

Rowland W. Philips, Notary Public, Nassau County 1291. N. Y. Co. Clk. No. 432. Commission expires March 30, 1944.

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[fol. 432] PLAINTIFF'S EXHIBIT No. 1

Cable Address "Brujuice"; Tampa, Florida, Code; Bentleys

Post Office Box 2271
February 26, 1942.

American Can Company, New York Central Bldg., 230 Park Ave., New York, N. Y.

Attention: Mr. A. W. Geier, Asst. Gen. Credit Mgr.

DEAR MR. GEIGER:

Enclosed please find, properly signed, your 90 day renewal note to American Can Company Southern in the amount of $7,039.25 and your note to American Can Company in the amount of $19,799.97.

We are also enclosing our check in the amount of $339.21 to cover interest on these notes as follows:

| | |
|---|---|
| American Can Company Southern | $88.96 |
| American Can Company | 250.25 |

Yours very truly, Bruce's Juices, Inc. (Signed) G. P. Peer.

GPP/mc.
encls.

[fol. 433] PLAINTIFF'S EXHIBIT No. 2

April 10, 1942.

Bruce's Juices, Inc., Tampa, Florida.

Attention of Mr. G. P. Peer

GENTLEMEN:

With reference to our phone conversation of today, and as you are unable to pay any part of the principal on your note dated Dec. 30, for $12,000.00, which was due and payable on March 30, we ask you to mail a check for $150.00 representing the interest due and affix your signature to the original of the enclosed 90-day note, dated March 30, 1942.

Kindly mail both the check and renewal note to our New York Office.

Very truly yours, M. M. Slayton, L. S. M. By R. D. Brocky.

RD-e.
Enc.
Cc: Mr. J. E. Sarver, Mr. R. A. Burger.

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[fol. 434] PLAINTIFF'S EXHIBIT No. 3

Tampa Sales (Packers Cans),
April 14, 1942.

Mr. J. E. Sarver, G. C. M., N. Y. Office.

Bruce's Juices, Inc., Tampa, Florida

DEAR SIR:

Kindly refer to your copy of our letter to customer dated Apr. 10. The renewal, together with interest check, was mailed to our Tampa Office and we are therefore passing same on to you for your records.

Very truly yours, M. M. Slayton, L. S. M., by R. D. Brocky.

RD-e.
Enc.
cc: Mr. R. A. Burger.
P. S. to Mr. Burger: Attached is above mentioned check R. D.

[fol. 435] PLAINTIFF'S EXHIBIT No. 7

June 7, 1940.

Mr. J. Adams Bruce, President; Bruce's Juices, Incorporated, Tampa, Florida.

DEAR MR. BRUCE:

Your unsecured time note, payable at this Office on June 14th to the American Can Company Southern is for the amount of $7,057.05; and note payable to the American Can Company due here the same date is for $107,784.60, but payments to date totalling $5,600.00 have reduced it to $102,184.60. It is our understanding that you intend to pay an additional $1,400.00 on this note prior to June 14th, as per Sr. Smalley's letter of May 14th.

In line with the arrangements which you made with our Mr. Sarver, we are enclosing herewith for signature two (2) five per cent renewal notes dated June 14th and maturing August 31st for the amounts of: $7,057.05 payable to the American Can Company Southern and $100,784.60 payable to the order of the American Can Company.

We are enclosing an interest statement showing that the interest which will have accrued on the two old notes to June 14th amounts to $937.92 for which amount we shall be pleased to receive your check when you return the signed renewals. In the event that the $1,400.00 referred to above is sent to us before June 14th we of course, expect that you will deduct interest on this amount at the rate of five percent from the date of payment to June 14th.

It will not be necessary to affix Florida Documentary Tax Stamps to the renewal notes as we shall attach the old notes to them and retain same in our files.

We trust that the above is in accordance with your understanding of how this matter was to be taken care of, and remain

Yours very truly, American Can Company, ———,
Treasurer.

HS-V.
Enc.

Cc: Mr. J. E. Sarver, Mr. L. D. Jenkins, Mr. H. H. Howry, Mr. M. M. Slayton.

[fol. 436] PLAINTIFF'S EXHIBIT No. 8

Bruce's Juices, Inc., Tampa, Florida

Mar. 1, 1940

American Can Co., 230 Park Avenue, New York, New York

Attn.: Mr. J. E. Sarver, General Credit Mgr.

GENTLEMEN:

We have checked the accrued interest as shown on your letter of Feb. 27th, but are unable to arrive at the same total as shown thereon.

Enclosed is the manner in which we have arrived at our accrued interest figure.

You will note that we show total accrued interest on these notes to March 1st, to be 1011.33 against your figure of 1152.91 or a difference of $141.58.

Kindly have your accounting department check this interest again as we are anxious to execute the renewal notes we are holding pending your answer.

Very truly yours, Bruce's Juices, Inc. (Sgd.) G. P. Peer.

| Date | Amount | Maturity | No. of days | | | Additional interest from maturity date of Notes to Mar. 1. Interest das Amt. | | |
|---|---|---|---|---|---|---|---|---|
| Nov. 6, 1939 | 13,776 91 | Feb. 4/5, 1940 | 90 | 91 | 17413 | 172 21 | 25 | 47 83 |
| Nov. 9, 1939 | 5,850 10 | Feb. 7, 1940 | 90 | | | 73 13 | 23 | 18 69 |
| Nov. 16, 1939 | 7,803 67 | Feb. 14, 1940 | 90 | | | 97 56 | 16 | 17 34 |
| Nov. 18, 1939 | 23,481 71 | Feb. 16, 1940 | 90 | | | 293 54 | 14 | 45 65 |
| Jan. 2, 1940 | 18,608 47 | Mar. 1, 1940 | 58 | 59 | 15249 | 149 90 | — | |
| Jan. 24, 1940 | 19,328 31 | Mar. 1, 1940 | 36 | 37 | 9933 | 96 65 | — | |
| Jan. 29, 1940 | 8,711 05 | Mar. 1, 1940 | 31 | 32 | 3872 | 37 51 | — | |
| Jan. 31, 1940 | 10,223 38 | Jan. 31, 1940 Mar. 1 | 30 | | | 42 60 | | |
| | | American Can—Southern | | | | | | |
| Nov. 18, 1939 | 1518 29 | Feb. 19, 1940 | 90-93 | | 19 61 | 18 99 | 11 | 232 |
| Jan. 22, 1940 | 5538 76 | Mar. 1, 1940 | 38-39 | | 30 00 | 29 24 | — | |
| | | | | | | $1011 33 | | |

[fol. 437] PLAINTIFF'S EXHIBIT No. 9

March 5th, 1940.

Bruce's Juices, Inc., Tampa, Florida

Attention: Mr. G. P. Peer

GENTLEMEN:

We have your letter of March 1st wherein you advise that the interest figure referred to in our letter of February 27th, of $1,152.91, has been found not to agree with your calculation, and you have submitted a statement indicating that this should be $1,011.33.

We have checked the statement which you sent along, and although in a few instances it is noted that you have figured the interest one day short, the principal difference occurs through your having computed the interest on those notes expiring prior to March 1st, only to the respective maturity dates as indicated in the notes rather than to March 1st as was intended. For your convenience we show below the manner in which we arrived at our figure of $1,152.91

American Can Company

| Date | Amount | Maturity | Interest to March 1st, 1940 Days | Amount |
|---|---|---|---|---|
| Nov. 6 | $13,776.91 | Feb. 3 | 116 | $221.96 |
| " 9 | 5,850.10 | " 7 | 113 | 91.81 |
| " 16 | 7,803.67 | " 14 | 106 | 114.89 |
| " 18 | 23,481.71 | " 16 | 104 | 339.18 |
| Jan. 2 | 18,608.47 | Mar. 1 | 59 | 152.49 |
| " 24 | 19,329.31 | " 1 | 37 | 99.33 |
| " 29 | 8,711.05 | " 1 | 32 | 38.72 |
| " 31 | 10,223.38 | " 1 | 30 | 42.60 |
| | $107,784.60 | | | $1,100.98 |

American Can Company Southern

| | | | | |
|---|---|---|---|---|
| Nov. 18 | 1,518.29 | Feb. 19 | 104 | 21.93 |
| Jan. 22 | 5,538.76 | Mar. 1 | 39 | 30.00 |
| | $ 7,057.05 | | | $ 51.93 |
| Total | $114,841.65 | | Total | $1,152.91 |

and trust that upon rechecking you will be able to reconcile the interest figure.

If you still find any points in question, we assure you that we will appreciate indeed your communicating with us.

Very truly yours, American Can Company,

Ass't General Credit Manager.

AWG • • • S.

CC—Mr. M. M. Slayton.

[fol. 438] PLAINTIFF'S EXHIBIT No. 10

March 11th, 1940.

Bruce's Juices, Inc., Tampa, Florida.

GENTLEMEN:

We acknowledge receipt of your check for $1,152.92, also two renewal notes dated March 1st in the amounts of $107,784.60 and $7,057.95—both maturing April 15th—tendered in settlement for the ten notes enumerated in our letter of February 27th.

We have attached the renewal notes to the original notes, all of which will be retained by us in order to avoid the need for placing documentary stamps on the renewal notes.

Very truly yours, American Can Company,
Ass't General Credit Manager.

AWG S.

CC—Mr. M. M. Slayton.

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[fol. 439] PLAINTIFF'S EXHIBIT No. 11

October 15, 1940.

Mr. J. Adams Bruce, President, Bruce's Juices, Inc., Tampa, Florida.

DEAR MR. BRUCE:

Confirming our several recent conversations relative to your coming pack, we are pleased to confirm the credit arrangements made which provide our extending you an open line of credit in order to get started of $10,000.00, including shipment made on October 11.

When this amount has been reached, all shipments will be handled on a cash basis before the cans leave our Factory, or you can give us secured notes up to $50,000.00, which is to include the present secured account.

With reference to the pay-back of this new credit; it is agreed that this — to be accomplished by your paying us a certain percentage of your weekly sales, starting December 1. On your December sales you are to pay us 5% and start-

ing January 1, 1941, you are to pay us 10% of your weekly sales until the $10,000.00 has been repaid. These payments are to be made to our New York Office each Tuesday covering the previous week's sales.

Also we understand that we will be furnished with a monthly balance sheet accompanied by an aging of the accounts payable and a list of the notes payable containing dates and maturity dates of each item. We believe this information will be available not later than the 15th of each month.

We acknowledge receipt of the following notes which have been accepted in settlement of your present unsecured note account with us:

American Can Company

| Date: | | |
|---|---|---|
| August 31, 1940 | $75,000.00 | Due December 31, 1941 |
| August 31, 1940 | $27,184.60 | Due in 90 days. |

American Can Company Southern

| Date: | | |
|---|---|---|
| August 31, 1940 | $7,039.25 | Due in 90 days. |

We have agreed that any discount credits accruing to you shall be applied against these unsecured notes.

We hope you will find all of the above in accordance with our understanding and that you will have a very profitable season.

Yours very truly, (Sgd.) A. W. Geier, Asst. Gen. Credit Manager.

AWG:vh.

cc: Mr. J. A. Griffin, President Exchange National Bank.
bc. Mr. J. E. Sarver, Mr. M. M. Slayton.

[fol. 440] PLAINTIFF'S EXHIBIT No. 12

Bruce's Juices, Inc., Tampa, Florida

December 12, 1940.

Via Air Mail

American Can Company, 230 Park Ave., New York City.

Attention: Mr. A. Geier

GENTLEMEN:

Enclosed please find our check in the amount of $1,430.21. This check is to cover interest on the following notes:

| | |
|---|---|
| Our Note of August 31, 1940 | $7,039.25 |
| Our Note of August 31, 1940 | 27,184.60 |
| Our Note of August 31, 1940 | 75,000.00 |

We regret very much the delay in getting these checks to you, but due to some unknown reason, the letters were never received in this office. It is our understanding that the notes in the amount of $7,039.25 and $27,184.60 will be renewed and that new notes will be sent to us for signature.

We are also enclosing our check in the amount of $705.33, which is 5% of the sales for the first week of December, which total $14,106.51. We are applying this amount on our present $10,000 open account. This payment reduces the limits of the open account to $9,294.67.

Very truly yours, Bruce's Juices, Inc., (Sgd.) G. P. Peer

GPP:ml. enc.

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[fol. 441] PLAINTIFF'S EXHIBIT No. 13

December 13, 1940.

Bruce's Juices, Inc., Tampa, Florida.

Attention: Mr. G. P. Peer

GENTLEMEN:

We acknowledge receipt of your letter of December 12th enclosing your check for $1,430.21, covering interest to No-

vember 29th on your two notes of August 31st, 1940 in the amounts of $7,039.25 and $27,184.60, and interest to November 30th on the $75,000.00 note dated August 31st also. According to our calculation, the interest for this period is $1,330.21, as per statement attached, therefore, you will perceive that you have made an overpayment of $100.00. After you have checked our figures will you kindly advise how we should dispose of this overpayment.

We are also enclosing for your signature, two ninety-day notes dated November 29th, 1940, for $7,039.25 and $27,184.60, to replace the ones which have matured, and would appreciate your returning them to us after they are signed.

Also, we wish to thank you for your check in the amount of $705.33, which represents 5% of your sales for the first week in December, and which is to apply against the $10,000.00 open account credit we extended you starting in October. We are asking Mr. Slayton to advise you and this department against which invoices this payment is being applied so that all of our records will be in accord.

With best personal regards, we are

Very truly yours, American Can Company, Ass't General Credit Manager.

AWG. S.

CC—Mr. M. M. Slayton. Will you please furnish us with the information as requested in the last paragraph of this letter.

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[fol. 442]

Bruce's Juices, Incorporated
Tampa, Florida

| Date | Amount | Interest September 3d to Nov. 29th @ 5% Days | Amount |
|---|---|---|---|
| August 31st | $27,184 60 | 87 | $328 49 |
| " 31st (Southern) | 7,039 25 | 87 | 85 05 |
| " 31st | 75,000 00 | Interest from Sep 3d to Nov. 30th 88 | 916 67 |
| | | Paid December 13th | $1,330 21 |
| | | Interest overpaid December 13th | 100 00 |
| | | Amount of check | $1,430 21 |

American Can Company, 230 Park Avenue, New York, N. Y., December 13th, 1940.

22—9556

PLAINTIFF'S EXHIBIT No. 14

Bruce's Juices, Inc.

Tampa, Florida

Note

December 16, 1940.

Via Air Mail * * *.

American Can Co., 230 Park Ave., New York City.

Attention: Mr. A. W. Geier

GENTLEMEN:

Enclosed please find two signed 90-day notes, dated November 29, 1940, for $7,039.25 and $27,184.60, to replace notes which have matured ——to Snyder 12/18.

We also noticed our error in calculating the interest in the amount of $100, as stated in your letter of December 13, after the check had gone forward. The writer discussed the matter with Mr. DoBrocky at Tampa and requested him to apply the $100 against our open account.

Very truly yours, Bruce's Juices, Inc., G. P. Peer.

FPP:ml.

Mr. Snyder will transfer $100 to a/c rec. AWG. 12/18. Received Dec. 18, 1940. American Can Company.

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[fol. 443] PLAINTIFF'S EXHIBIT No. 15

7-23-43 R. W. P.

Bruce's Juices Incorporated

Tampa, Florida

January 17, 1941.

Via Air Mail * * *

American Can Company, 230 Park Avenue, New York City.

Attention: Mr. A. W. Geier

GENTLEMEN:

Referring to your letter of the 14th, we have assumed that the Tampa office has informed you that Mr. Peer was sick

for over a week and we limited our payments during that time to the actual disbursements necessary to the conduct of our operations from day to day. Mr. Peer is back in the office now and as soon as he has an opportunity of catching up work, he will bring the payments up to date.

I have warned you that the excessive payments in liquidation of this account might possibly over-extend us on other essential payables. You doubtless are aware of the extremely stupid conduct of our competitors in selling their merchandise way below cost, which has hampered our operations during November and December. We are now in the extended condition which I predicted might exist and will probably remain so for some time, particularly in keeping up the payments according to agreement.

Please be advised also that in view of Mr. Peer's illness, we are no making up December 31 statement, as it will take us all our time to get caught up with our ordinary accounting. The usual statement will be made on January 31, which will cover the months of December and January.

Yours very truly, Bruce's Juices, Inc., A. Bruce.

JAB:ML.

Check enclosed covers week—12/29—¼ reduces limit of open account to $5605.00.

Ck. $1362.31. Dated 1/17/41.

Received Jan. 20, 1941. American Can Company, Credit Dept.

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[fol. 444] PLAINTIFF'S EXHIBIT No. 16

Bruce's Juices, Inc.
Tampa, Florida
Post Office Box 2271

Cable Address: "Brujuice", Tampa, Florida. Code: Bentleys.

October 30, 1941.

American Can Company, 230 Park Avenue, New York, N. Y.

Attention: Mr. A. W. Geier, Ass't Gen'l. Credit Manager

GENTLEMEN:

Last year at this time we had occasion to put on a note basis, $75,000.00 to become due December 31, 1941. This

note is still on our books and we would like whatever assurance is necessary to give our auditor that this note will be handled on the same basis December 31st, in other words, that for that time it will be renewed to fall due December 31, 1942.

Although our audit is not quite complete Mr. Harvey, our auditor advises us that our profit for the past season will run somewhere in the neighborhood of $3,500.00.

Very truly yours, J. Adams Bruce.

jab/gpp.

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PLAINTIFF'S EXHIBIT No. 17

Bruce's Juices, Inc.

Tampa, Florida

Post Office Box 2271

Cable Address; "Brujuice", Tampa, Florida. Code: Bentleys.

November 1, 1941.

American Can Company, 230 Park Avenue, New York, N. Y.

Attention: Mr. A. W. Geier, Ass't Gen'l Credit Manager

GENTLEMEN:

Kindly refer to our letter of October 30th regarding our note to you in the amount $75,000.00. If you are agreeable to extending this note on its due date, December 31, 1941, will you be kind enough to forward your advice to Mr. Harvey, our auditor. Mr. Harvey's address is Wilkins & Harvey, 205 Zack Street, Tampa. Thank you for your co-operation in this matter.

Very truly yours, Bruce's Juices, Inc., G. P. Peer.

gpp/p.

[fol. 445] PLAINTIFF'S EXHIBIT No. 18

November 30th, 1939.

Bruce's Juices, Inc., Tampa, Florida

Attention: Mr. J. Adams Bruce, President

DEAR MR. BRUCE:

Confirming conversation in our office today, at which time you executed renewal notes replacing notes which we are holding in the amount of $149,995.34.

As explained to you, in order to comply with the documentary stamp requirements on these notes it is necessary that the renewal notes be attached to the original notes carrying the documentary stamps, and for this reason we are not surrendering to you the old notes which the renewal notes replace.

Very truly yours, American Can Company, —— ——, General Credit Manager.

JES S.

CC Mr. L. D. Jenkins, Mr. H. H. Howry, Mr. M. M. Slayton, Mr. R. A. Burger, Att: Mr. H. Snyder. Attached are the executed renewal notes in question.

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PLAINTIFF'S EXHIBIT No. 19-A

Bruce's Juices, Inc., Tampa, Florida

February 6th, 1940.

American Can Company, 230 Park Avenue, New York City, N. Y.

Attention: Mr. J. E. Sarver

GENTLEMEN:

Enclosed please find our check in the amount of $976.14 to cover note interest as shown on statements accompanying your letter of Feb. 2nd, 1940. Also enclosed please find signed notes. According to our understanding these extended notes are to be attached to the original notes which you are holding.

Yours very truly, Bruce's Juices, Inc., (Sgd.) G. P. Peer.

GPP/w.

[fol. 446] PLAINTIFF'S EXHIBIT No. 19-B

February 2nd, 1940.

Bruce's Juices, Inc., Tampa, Florida

Attention: Mr. J. Adams Bruce, President

DEAR MR. BRUCE:

Referring to our conversation last week in Chicago, wherein you requested that we wait until March 1st to complete final arrangements for the handling of the balance which you are now owing us on unsecured notes, which balance represents approximately $115,000—some of which is represented by notes which are now past due. For these items we have prepared renewal notes running to March 1st, 1940, and are enclosing them herewith for your signature, together with statement showing the amount paid on the principal of each note, as well as the amount credited to the principal of these notes due to the 2% allowance on your can purchases for 1939, and also the 1% quantity discount on your 1939 purchases.

Believe this statement will be self-explanatory, and if you find it to be in agreement with your records, will you kindly complete these notes with your signature and return them to us promptly, at the same time giving us your check for $976.14 covering the accrued interest on the old notes.

You will note that we have separated the credit as between American Can Company and American Can Company Southern accounts, as this manner of handling ties in better with our records, and we believe you would also want this separation for your own records.

With very best regards, I am

Very truly yours, ——— General Credit Manager

JES S.

CC—Mr. R. A. Burger, Mr. M. M. Slayton, Mr. L. D. Jenkins.

[fol. 447]

PLAINTIFF'S EXHIBIT No. 19-C

Bruce's Juices Incorporated, Tampa, Florida

| Date | Amount of Note | Amount Paid or Credited | Balance | Due Date | Interest From Date of Note To Due Date at 5% | | | |
|---|---|---|---|---|---|---|---|---|
| | | | | | Days | Interest on Face Amount | Allowed For Payment | Net Interest Due |
| Oct. 13th | $16,147.21 | | | Jan. 2d | 81 | $181.67 | | |
| Paid— | | | | | | | | |
| Dec. 24th | | $6,300.00 | | | 9 | | $7.88 | |
| Credited— | | | | | | | | |
| Jan. 1st. | | 9,847.21 | | | 1 | | 1.37 | $172.42 |
| | | | .00 | | | | | |
| Oct. 19th | 22,175.25 | | | Jan. 2d | 75 | 230.99 | | |
| Credited— | | | | | | | | |
| Jan. 1st | | 3,566.78 | | | 1 | | $.50 | 230.49 |
| | | | 18,608.47 | | | | | |
| Oct. 26th | 19,329.31 | | $19,329.31 | Jan. 24th | 90 | 241.61 | | 241.61 |
| Oct. 30th | 8,711.05 | | 8,711.05 | Jan. 29th | 91 | 110.10 | | 110.10 |
| Nov. 2d | 10,223.38 | | 10,223.38 | Jan. 31st | 90 | 127.79 | | 127.79 |
| | | | $56,872.21 | Accrued Interest Due | | | | $882.41 |

*Credited on Notes as of Jan. 1st as shown above a total of $13,413.99 made up of:

| | |
|---|---|
| 2% Allowance | $9,002.68 |
| and 1% " | 4,411.31 |
| | $13,413.99 |

American Can Company,
230 Park Avenue,
New York, N. Y.

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[fol. 448]

PLAINTIFF'S EXHIBIT NO 19-D

Bruce's Juices Incorporated, Tampa, Florida

| Date | Amount of Note | Amount Paid or Credited | Balance | Due Date | Interest From Date of Note To Due Date at 5% | | | |
|---|---|---|---|---|---|---|---|---|
| | | | | | Days | Interest on Face Amount | Allowed For Payment | Net Interest Due |
| Oct. 23rd | $7,978.10 | | | Jan. 22nd | 91 | $100.84 | | |
| Credited— Jan. 1st | | $2,439.34 | | | 21 | | $7.11 | |
| | | | $5,538.76 | Accrued Interest Due | | | | $93.73 |

Credited on above Note as of Jan. 1st as shown above $2,439.34 which is made up of:

| | | |
|---|---|---|
| 2% | Allowance | $1,637.14 |
| 1% | " | 802.20 |
| | | $2,439.34 |

Amercan Can Company,
230 Park Avenue,
New York, N. Y.

[fol. 449] PLAINTIFF'S EXHIBIT No. 20

February 27th, 1940.

Mr. J. Adams Bruce, President, Bruce's Juices, Inc., Tampa, Florida.

DEAR MR. BRUCE:

Confirming conversation in our office today, we are enclosing herewith renewal notes for your signature, as follows:

Note to American Can Company, dated March 1st, 1940 $107,784.60

Note to American Can Company Southern, March 1st, 7,057.05

both of these renewal notes mature April 15th, 1940, and the accrued interest on the old notes to March 1st amounts to $1,152.91 and represent amounts of maturing notes as follows:

| | Date | Amount | Maturity |
|---|---|---|---|
| American Can Company | Nov. 6, 1939 | $93,776.91 | Feb. 5, 1940 |
| | Nov. 9, 1939 | 5,850.10 | Feb. 7, 1940 |
| | Nov. 16, 1939 | 7,903.67 | Feb. 14, 1940 |
| | Nov. 18, 1939 | 23,481.71 | Feb. 16, 1940 |
| | Jan. 2, 1940 | 18,608.47 | Mar. 1, 1940 |
| | Jan. 24, 1940 | 19,329.31 | Mar. 1, 1940 |
| | Jan. 29, 1940 | 8,711.05 | Mar. 1, 1940 |
| | Jan. 31, 1940 | 10,223.38 | Mar. 1, 1940 |
| | | $107,784.60 | |
| American Can Company Southern | Nov. 18, 1939 | $1,518.29 | Feb. 19, 1940 |
| | Jan. 22, 1940 | 5,538.76 | Mar. 1, 1940 |
| | | $7,057.05 | |

Will you kindly arrange to complete both of the enclosed notes with your signature, returning them to us, along with your check for $1,152.91 in payment of the interest on the old notes. You, of course, understand that the original notes will be retained by us in order that it will not be necessary to place new documentary stamps on the renewal notes.

In addition to the above two notes, you are owing us on DEMAND notes secured by warehouse receipts on canned products a total of $26,763.74, and in line with our conversation we understand that you propose to reduce the amount of these secured notes by April 15th to a total of $15,000.00; and that you will reduce the total on the un-

secured notes to $110,000.00 * * * or a total of secured and unsecured of $125,000.00.

As stated to you this morning, if you reduce the unsecured notes below $110,000.00, then we would be agreeable to taking additional secured paper from you for the amount the unsecured notes have been reduced. Also, if between now and April 15th you reduce your secured note indebtedness to us, we are agreeable to replacing this with a like amount of new secured and unsecured indebtedness — does not exceed $125,000.00.

If the above is not in accordance with your understanding of our conversation would be pleased to have you advise us of any differences promptly.

Very truly yours General Credit Manager, JES * * * S, CC—Mr. R. A. Burger, Mr. L. D. Jenkins, Mr. H. H. Howry, M. M. Slayton.

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[fol. 450] PLAINTIFF'S EXHIBIT No. 21

April 8th, 1940.

Mr. J. Adams Bruce, President, Bruce's Juices, Inc., Tampa, Florida.

DEAR MR. BRUCE:

Referring to conversation in our office some ten days ago regarding your account, believe it was agreed at that time that you would reduce the balance on your unsecured notes to $100,000.00 and we would renew this balance of $110,000.00 for sixty days. We have prepared and are enclosing herewith renewal notes as follows:

| | |
|---|---|
| American Can Company Souther-, note dated April 15, 1940 for | $ 7,057.05 |
| American Can Company Souther-, note dated April 15 1940 for | 102,942.95 |

This leaves a balance on the principal of these unsecured notes of $4,841.65, and accrued interest to April 15th of $717.77, making a total of principal and accrued interest of $5,559.42.

Will you kindly arrange to complete the renewal notes with your signature, returning them to us, together with your check for $5,559.42, to reach us by April 15th.

Trusting that you will find the above in line with your understanding of our conversation, and with very best wishes.

Very truly yours, —— —— General Credit Manager.
Jes * * * S. CC—Mr. R. A. Burger, Mr. E. D. Jenkins, Mr. H. H. Howry, Mr. M. M. Slayton.

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[fol. 451] Bruce's Juices, Incorporated
Tampa, Florida

Note to American Can Company Southern—

| Date of Note | Amount of Note | Interest from March 1 to April 15 at 5% Days | Amount |
|---|---|---|---|
| March 1, 1940 | $7,057.05 | 45 | $44.11 |

Note to American Can Company—

| Date of Note | Amount of Note | Interest from March 1 to April 15 at 5% Days | Amount |
|---|---|---|---|
| March 1, 1940 | $107,784.60 | 45 | $673.66 |
| Principal | $114,841.65 | | $717.77 |
| Accrued Int. | 717.77 | | |
| | $115,559.42 | | |

| | | |
|---|---|---|
| Sixty (60) day renewal note to American Can Company Southern enclosed for signature | | $7,057.05 |
| Sixty (60) day renewal note to American Can Company for signature | | 102,942.95 |
| | | $110,000.00 |
| Interest due American Can Company Southern April 15th | $44.11 | |
| Partial payment on prineipal of note due American Can Company April 15th $4,841.65 | | |
| Interest on note due American Can Company April 15th 673.66 | | |
| | 5,515.31 | |
| | | 5,559.42 |
| | | $115,559.42 |

American Can Company,
230 Park Avenue,
New York, N. Y.
April 5th, 1940

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[fol. 452] PLAINTIFF'S EXHIBIT No. 22

April 22nd, 1940

Mr. J. Adams Bruce, President, Bruce's Juices, Inc., Tampa, Florida.

DEAR MR. BRUCE:

Referring to conversation in our office Friday, April 19th, and supplementing our letter of April 8th with which

we sent you for signature two renewal notes—one for American Can Company Southern in the amount of $7,057.05, and one for American Can Company in the amount of $102,942.95, which two notes were proposed renewals of American Can Company Southern note dated March 1st, 1940 for $7,057.05, and American Can Company note dated March 1st, 1940 for $107,784.60. In line with our conversation, we are agreeable to letting these old notes ride along in their present amounts until such time as the matter discussed with Mr. Nugent and Mr. Jenkins Friday can be finally adjusted, and if it is finally decided that there is any adjustment due you, the amount of such adjustment can be applied against the principal of the unsecured notes we are holding.

Therefore, since both of the old notes matured April 15th, and in order to bring them in an up-to-date condition, we are enclosing herewith for your signature American Can Company note dated April 15th, 1940 for $107,784.60, and would ask that you complete this note with your signature, also the American Can Company Southern note for $7,057.05 sent you with our letter of April 8th, and return them both to us, together with your check for $717.77 in payment of the accrued interest to April 15th on the old notes.

Your secured note indebtedness to us at the present time stands at $7,707.37 and, in line with our conversation with you Friday, we are agreeable to increasing this secured line up to $50,000.00—such notes to be secured by warehouse receipts on canned goods on the same basis as previous receipts taken from you, and these receipts are to be delivered to our Tampa office prior to the time you desire cans shipped against them. This additional line of secured credit is being extended to you with the understanding that for each $6,000.00 of secured notes which you give us, you will pay $1,000.00 on the principal of your unsecured notes which we are holding; also, if you can reduce the unsecured notes beyond this amount, we are agreeable to replacing the amount you reduce your unsecured paper with secured paper, even though this should increase the total amount of secured paper which we take from you over and above the $50,000.00 figure mentioned in the forepart of this letter.

We will also continue to ship cans to you on open billing, with the understanding that such invoices are to be liqui-

dated each week, and at no time is the total amount unpaid on such shipments to amount to more than $10,000.00.

Trusting that the above is in line with your understanding, and with very best regards, I am,

Very truly yours, —— ——, General Credit Manager.

Jes * * * S. CC—Mr. R. A. Burger, Mr. L. D. Jenkins, Mr. H. H. Howry, Mr. M. M. Slayton.

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[fol. 453] PLAINTIFF'S EXHIBIT No. 23

Bruce's Juices, Inc.,

Tampa, Florida

Post Office Box 2271

Cable Address "Brujuice", Tampa, Florida.
Code: Bentleys.

April 25, 1940.

American Can Co., 230 Park Avenue, New York, New York.

Attention: Mr. J. E. Sarver

GENTLEMEN:

In response to your letter of April 22nd, enclosed please find signed notes (American Can Co.—$107,784.60 and American Can Southern—$7057.05 dated April 15th due in 60 days) plus our check in the amount of $717.77 to cover interest on old notes.

Very truly yours, Bruce's Juices, Inc., G. P. Peer.

GPP:jh.

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[fol. 454] IN CIRCUIT COURT OF HILLSBOROUGH COUNTY

Pursuant to Pre-Trial Order theretofore entered, the following testimony was taken by the plaintiff before the Honorable L. L. Parks on the 9th day of August, 1943; filed Sept. 9, 1943:

Thereupon, the Plaintiff to maintain the issues on its behalf then and there produced and caused to be sworn as a witness, M. M. SLAYTON, who testified as follows:

Direct examination.

Questions by Mr. Allison:

Q. Please state your name and address?
A. M. M. Slayton, 3305 San Miguel, Tampa, Florida.
Q. What is your occupation?
A. District Sales Manager, American Can Company.
Q. Are you located in Tampa, Florida?
A. Yes sir.
Q. How long have you been so located here?
A. For about eight years.
Q. Do you know the Defendant, Bruce's Juices, Inc.?
A. Yes sir.
Q. How long have you known them?
A. Eight years or more.
Q. Mr. Slayton, are you acquainted in your capacity as District Sales Manager with this law suit by the American Can Company against Bruce's Juices, Inc., involving one note for $12,000, one note for $19,799.97 and one note for $7039.25?
A. I am.
Q. Mr. Slayton, I am going to read to you the fifth Amended Plea which is the same as the tenth amended Plea, and I want you to listen carefully because I want to ask you some questions after I have read it to you. These are the Pleas the Defendant, Bruce's Juices, Inc., has filed in this [fol. 455] action. (Thereupon the said Plea, which has heretofore been included at page 9 of the transcript, was read to the witness.)

Which notes are dated March 30th and February 23rd, 1942. Now Mr. Slayton, have you any knowledge of any express condition or understanding between the American Can Company and Bruce's Juices, Inc., at the time these notes were delivered?
A. No.
Q. Did you ever enter into any such an agreement for the American Can Company?
A. No sir.
Q. Have you ever accepted any notes from Bruce's Juices for the American Can Company with any such understanding or agreement?
A. No sir.
Q. It is a fact that from time to time in the execution and

delivery of notes that they would be forwarded through your branch here to the New York Office?

A. That is correct.

Q. And you state that in your eight years there has never been any such agreement or understanding that you knew anything about?

A. That is correct.

Q. Mr. Slayton, do you have any knowledge whether these notes I have described were delivered to the American Can Company subject to or under any conditions?

A. I do not.

Q. Do you have occasion with your customers to take notes from time to time?

A. Yes sir.

Q. They are forwarded I presume to the New York Office?

A. Correct.

Q. And you are positive that these particular notes of Bruce's Juices were not delivered under any conditions that were brought to your attention?

[fol. 456] By Mr. Fowler: That is objected to as leading and repetitious and self serving.

By the Court: I think you have asked him that.

Cross-examination.

Questions by Mr. Cody Fowler:

Q. Mr. Slayton, you knew as a matter of fact that a controversy did exist between Mr. Bruce and the American Can Company on certain matters in which he claimed a discrimination did you not?

A. Yes sir.

By Mr. Allison: Objected to as not proper cross examination.

By the Court: I think that is a proper question.

By Mr. Fowler:

Q. You knew that he was complaining, among other things, that a price was being made on cans going to Texas, cans known as 3-12 cans?

A. Yes sir.

Q. During the spring of 1940 Mr. Bruce to your knowledge had many contacts with the American Can Company

through its various officials or representatives, did he not?

A. I think he did.

Q. He went to New York and you know as a matter of fact in your official capacity that he discussed business up there with various members of the American Can Company organization?

A. That is correct.

Q. And you know as a matter of fact that he had many conversations with them because he was up there a great deal and had a good deal of business with them?

A. Correct.

[fol. 457] Q. That during some of this period of time he had an office up there, did he not, not very far away from the American Can Company Office on 42nd Street, over the Grand Central Station, is that not correct?

A. I don't know where it was.

Q. You do know that he had some conferences up there with Mr. Sarver in April 1940, you know that of your own knowledge?

A. I don't recall the date.

Q. Do you recall that there was a letter written which referred to a conversation that he had with Mr. Nugent regarding delivery of these notes?

A. I don't recall the detail.

Q. You did receive a copy of a letter. To refresh your memory I will ask you to read that. Which letter purports to be a copy of a letter. And see if that refreshes your memory?

A. There were so many letters that have been written over a period of years that it would be hard for me to identify one from another because the business end was handled by New York.

Q. Sometimes they sent you copies and sometimes they did not?

A. I think I got copies alright, but the business end was not handled by me. There might have been a copy because there was a lot of correspondence between New York and Bruce's Juices.

Q. What was your business in connection with the American Company and Bruce's Juices?

A. Selling cans.

[fol. 458] Q. Did you handle the sale to Bruce here?

A. Yes sir.

Q. And to other companies who bought cans from you in Tampa?

A. Yes sir.

Q. That is California Packers and Stokely Brothers?

A. Yes sir.

Q. Have you had charge of all of this territory?

A. That is correct.

By Mr. Allison: I object to that as immaterial and irrelevant.

By the Court: Objection sustained.

Q. Naturally you did not know what conversation took place in New York when you were not there, do you?

A. No sir.

Q. By your testimony you mean you were not present at any such conferences and you did not personally make it, is that correct?

A. That is correct.

Q. You don't know whether they made it or not?

A. That is correct.

In view of the Court's ruling a while ago I think that is all of the questions I want to ask.

Redirect examination.

By Mr. Allison:

Q. Mr. Slayton, you stated in response to a question on cross-examination that Mr. Bruce complained of the 3-12 cans sales in Texas. Is that the only complaint that he made?

A. No sir, he made numerous complaints.

Q. You mean over the period of years he complained?

A. Yes sir, that is right.

Q. About any particular thing or just everything?

[fol. 459] A. I think, my personal opinion is that he was a damned hard customer to serve and always complained.

Q. About the same thing or different things?

A. Oh no, everything that we ever did. No particular reference to any one thing. It might have been service on closing machines or closing machine pipes or the price of cans or it might have been the F.O.B. points.

Q. Was that connected in any way with your feelings with him when these notes were delivered?

A. No sir.

Recross-examination.

By Mr. Fowler:

Q. He complained, did he not, that the 3-12 cans had been sold to him during 1938 and in the winter of 1939 at a price higher than $9.68, when you began selling them without notifying him in the fall of 1939 to Texas for $9.68, or the American Can Company did?

A. I recall the complaint but not the details.

Q. That in substance was one of them?

A. Yes sir.

Q. He also called your attention to the fact in connection with these complaints that you had sold him the 3-12 cans F.O.B. Baltimore with freight equalized with Tampa up until during the time he bought them and that after you made the price on them at 68 to Houston, Texas, you refused thereafter to equalize that freight from Tampa and made him pay the freight from Baltimore?

A. I don't recall the details.

Q. Would you say that is not correct?

[fol. 460] A. I would not say that is not correct. Our prices are handled by New York. The details are all handled by the New York office and I carry on under instructions.

Q. He complained that you were willing to sell him the 3 12 cans F.O.B. Tampa? I will state that all of the cans referred to are the small individual service of 2 02 in diameter, and the difference between the 3 09, 3 12 and 3 14 is only the question of height, and each one of these numbers means one sixteenth of an inch in height—he complained, did he not that you were still willing in 1940—that he had discovered that ever since the fall of 1939 you had been selling the 3 10 cans in Texas at $9.68, is not that correct?

A. I don't recall the dates.

Q. You do recall the complaint?

A. I recall numerous complaints on these cans and there was too many of them.

Q. You would not say that he did not make that complaint?

A. No sir.

Q. You also recall that he made the complaint in the spring of 1940 after he discovered about this price in

Texas, that while you were selling him the three hundred can and the three hundred and nine can in Baltimore, freight equalized in Tampa, and the three hundred and fourteen can but that you had not equalized the freight for Tampa on the three hundred and twelve can. Do you remember the complaint about that?

A. About the hundred and fifty times that I probably visited Bruces' Juices' we discussed that little can every time. I don't recall the details because we had nothing to do with the F.O.B. prices or forming the prices.

[fol. 461] Q. You do not know why that was done in Baltimore and New York?

A. No sir.

By Mr. Allison: Objected to as assuming something existed that is not shown that did exist.

Q. You do remember that the situation existed that you were selling or that the company did make a price on the 3 14 F.O.B. Tampa, 203 by 300 F.O.B. Baltimore, freight equalized to Tampa and the 3 12 F.O.B. Baltimore and no freight equalized in Tampa, you do remember that do you not?

A. I am not prepared to say that each one of those cans were equalized in Tampa. I don't recall that. I did not prepare myself for questions like that.

Q. I call your attention to a letter signed M. M. Slayton. That is you is it not?

A. Yes sir.

Q. By W. T. Taylor, dated June 18, 1940, addressed to Bruces' Juices' and ask you first if that is the signature of Mr. Taylor and if he was representing you in sending that letter?

A. Yes sir that is correct.

Q. Now referring to the price list which accompanied the letter and which was referred to therein I will ask you if it was not true that you sold the 3 12 can F.O.B. Baltimore, the two hundred and two by three hundred can F.O.B. Baltimore, freight equalized to Tampa, the 202 by 309 F.O.B. Baltimore, freight equalized at Tampa, the 202 by 314, F.O.B., freight equalized to Tampa and the 202 by 312 can that Mr. Bruce was complaining about you were selling to Texas at $9.68 F.O.B. Baltimore with no freight equalized to Tampa?

[fol. 462] By Mr. Allison: Objected to because it is now shown that the quotations was ever acted on and it was not brought out on direct and it is not in proper cross-examination.

By the Court: Let him answer the question.

A. I couldn't tell anything about that. It is true that that is Taylor's signature but it is always possible for a typographical error.

Q. But you would not say that that price that went out under your own signature was correct?

A. It is always possible for a typographical error.

Q. Do you claim that that was a typographical error?

A. No sir, I do not.

Q. I will ask you if you think that this addition with reference to the 202 by 312 can, nine fifty F.O.B. Baltimore, approximate cost of freight from Baltimore to Tampa for a thousand cans .65, is that what you think could be a typographical error?

A. Today, with what has gone over the dam with me now, I don't profess to keep this in my mind. I could tell you in the office what the instructions were in quotations from New York.

Q. You do admit that a letter went out under your name signed by Mr. Taylor dated June 18, 1940, and that it did include this price list. You admit that do you not?

A. I assume that it did. I don't believe that I have ever seen it.

Q. Was it done without your authority in your office would you say?

[fol. 463] A. Mr. Taylor has authority.

Q. Then looking at it now would you say that it is correct?

By Mr. Allison: Same objection.

By the Court: We will hear from this other Gentleman here.

By Mr. Allison: I will put him on the stand. The questions will be on the scope of the notice in this case and the witness stated that he is not prepared to answer the detailed questions on prices and rates going back for eight years.

By the Court: If this Gentleman wishes to get his record on it he will have an opportunity to do it. It may be cleared up by the testimony of this other witness. I don't know.

Thereupon, the Plaintiff to further maintain the issues on its behalf then and there produced and caused to be sworn as a witness, Walter T. Taylor, who testified as follows:

Direct examination.

By Mr. Allison:

Q. Please state your name?
A. Walter T. Taylor.
Q. Where do you live?
A. 407 Royal Palm Way in Beach Park.
Q. What is your business or occupation?
A. I represent the American Can Company.
Q. What is your capacity with them?
A. I guess you would call it a sales-man.
Q. You are working out of the Tampa branch?
A. That is right.
Q. And you work with or under Mr. Slayton?
[fol. 464] A. Under Mr. Slayton.
Q. How long have you been connected with them there?
A. Approximately six years.
Q. Do you know the Defendant, Bruce's Juices?
A. Yes sir.
Q. Are you generally familiar with this law suit against Bruce's Juices by American Can Company involving three notes?
A. I might say in a general way. I have heard discussions but I am not so well acquainted.
Q. For your information this is a suit involving a note dated March 30th, 1942, for $12,000, a note dated February 23rd, 1942 for $19,799.97 and a note dated February 23rd, 1942 for $7,039.25, the last note being made originally to American Can Company Southern. The defendant Bruce's Juices has filed several pleas in defense. I am reading to you as I did Mr. Slayton the fifth plea. (Reading Plea #5, which has heretofore been included at page 9 of the transcript, to the witness.) Do you recall that when I read it to you?
A. Yes sir.
Q. I will ask you if you on behalf of the American Can Company or otherwise entered into any prior express condition or understanding regarding these notes when they

were delivered by Bruce's Juices to American Can Company?

A. No sir.

Q. Did you on behalf of the American Can Company enter into any agreement or understanding similar to that described in the pleas?

A. No sir.

Q. At any time?

A. No sir.

Q. Did you ever have any discussion with Mr. J. Adams [fol. 465] Bruce concerning such an express condition and understanding regarding these notes?

A. No sir.

Cross-examination.

By Mr. Fowler:

Q. You stated you were a salesman I believe with the American Can Company?

A. Representative.

Q. Sales representative?

A. Yes sir.

Q. What are your general duties?

A. Contacting the trade, covering everything between our company and our customers.

Q. Your customers in this area?

A. Yes sir.

Q. Bruce's Juices was one of them, and California Packing Company?

A. I did not contact them.

Q. Who does contact the California Packing Company?

A. Another salesman.

Q. Who do you contact locally?

A. Stokely Brothers and another small account in Tampa. I cover a good portion of the State.

Q. And all of them are here except the California Packing Company?

A. All our customers, yes sir.

Q. Where is that handled from?

A. Tampa, Florida.

Q. Mr. Slayton sells them does he?

A. I guess you would call it. We have another man in the same capacity as myself who contacts them.

Q. Who else does he contact?

By Mr. Allison: Objected to as not proper cross examination.

By the Court: All we are concerned with is Bruce's Juices and he says he contacted them.

[fol. 466] Q. You just did not discuss any of the questions of accounts or indebtedness of Mr. Bruce with the Company did you?

A. The only thing I would have to take up in regard to that would be to go around and hand Mr. Bruce the note for signature for renewal. As far as any controversy or anything of that nature I would never handle that.

Q. You do not know about that and were not supposed to know?

A. I would not say I was not supposed but that was not in my capacity.

Q. You were not supposed to handle that in other words?

A. I suppose that would be the correct answer.

By the Court:

Q. Did you receive these notes here or do you remember?

A. I couldn't say. I might be able to find out. I use to go over there at intervals and have notes or leases or something else to sign and it would be pretty hard to lay my finger on any particular one.

Q. You would not say that you did handle these notes would you?

A. I wouldn't say yes or no, there was so many of these things to be signed I couldn't say which one I had.

By Mr. Fowler:

Q. I will ask you as a matter of fact if these notes were not handled directly from New York, do you know that as a matter of fact?

A. I wouldn't know that as a matter of fact.

Q. You would not say that they were not?

A. No sir.

Q. I hand you a letter addressed to Bruce's Juices from [fol. 467] American Can Company dated June 18, 1940 signed Slayton by Taylor, is that your signature?

A. That is right.

Q. It enclosed a price list, did it not?

A. May I just say that that is my signature apparently written by a stenographer. That is not my own signature. I do not know whether that makes any difference but it is not my signature.

Q. Do you know anything about the price list that was enclosed therein?

A. I would not doubt but that I sent that. I would have to check back but I believe that is true.

Q. Would you say as a representative of the American Can Company in whose name this letter was signed that that was a price list sent and that that was correct and was your price list to Bruce's Juices at that time?

A. I would have to refer back.

Q. You could not look at the document and tell?

A. No sir, not without—not that long I couldn't.

By Mr. Fowler: I will ask that this letter be marked for identification as Defendant's Exhibit X-1.

Redirct examination.

By Mr. Allison:

Q. Mr. Taylor, do you know whether or not on June 18, 1940, the American Can Company at its Tampa plant was manufacturing 202 by 300 cans?

A. I couldn't say that.

Q. Or any of those sizes?

A. No sir, I couldn't say so.

[fol. 468] Q. Will you furnish that information when you verify whether that is correct or not?

A. Yes sir.

By Mr. Fowler:

Q. You know as a matter of fact that they were not making the 300 cans here do you not?

A. I couldn't say.

Q. You don't know what cans were being made here?

A. I know our standard cans and I know we sold Bruce's Juices various size cans. Most of them were manufactured in Baltimore. The only one I am positive is 202 by 304, I know was manufactured in Tampa.

Q. What do you mean by the standard cans?

A. Those used by the standard trade.

Q. And that were used by the trade here?
A. Yes sir.
Q. They were all the same?
A. Yes sir.

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[fol. 469] IN CIRCUIT COURT OF HILLSBOROUGH COUNTY

Pursuant to Pre-Trial Order theretofore entered, the following testimony was taken before the Honorable L. L. Parks on the 6th day of October, 1943; and filed Nov. 15 1943:

The plaintiff, to maintain the issues on its behalf then and there produced and caused to be sworn as a witness, H. L. SNYDER, who testified as follows:

By Mr. Allison:

Q. Will you state your name, address and occupation?
A. Henry L. Snyder, Baldwin, Long Island, New York State; I am the bills receivable clerk in the Treasury Department of the American Can Company, at their New York Office, directly responsible to Mr. R. A. Burger, the Treasurer of the Company.
Q. Mr. Snyder, you have previously testified in one of the consolidated causes at a hearing in New York in July, 1943, regarding certain of the notes?
A. Yes, I have.
Q. Mr. Snyder, I hand you what purports to be a promissory note from Bruce's Juices to American Can Company, and ask you if you know who is the owner and holder of that note.
A. The owner and holder of this note is The American Can Company.
Q. Have you handled that note in your capacity as testified?
A. I have.
Q. All payments on account of such notes pass over your desk?
A. All of them.
Q. Do you know how much is due on that note at this time?
A. There is due at this time $75,000.00 representing the principal amount of the note. The interest has been paid

to November 30, 1943, but the accrued interest from Nov. [fol. 470] 30, 1942 to today amounts to an additional $3,229.17. The amount of interest which will accrue per day on this note is $10.42.

Q. You have testified the amount due of $3,229.17 of interest. Did that extend through October 6th?

A. To October 6th.

Q. The daily rate you have testified that would accrue from October 6th until paid?

A. Yes, sir.

Q. Was interest paid on the note up to November 30, 1942?

A. Yes, Sir. The interest was paid to November 30, 1942 and the endorsements of the interest appear on the reverse side of the note.

Q. Do you know who paid that interest?

A. Bruce's Juices, Inc. paid the interest.

Q. Mr. Snyder, do you know what the consideration of the note was—in other words what it covered?

A. That note in the main covered the purchase price of cans. This note, or the indebtedness represented by this note, is a part of another note which we had for the amount of $107,784.60 which note, in turn, was a consolidation of several renewals or renewal notes, which original notes we received in 1939.

Q. Did the three notes which you have already testified about and the $75,000.00 note cover anything in addition to the purchase of cans?

A. Yes, sir, they covered small charges for machine parts, can openers, and Ocean Freight and Insurance. The amount of those charges altogether is $482.14.

Q. That is all that was covered except the can purchases?

A. Yes, sir.

Q. Machine parts?

A. Machine parts.

Q. Can openers, Ocean Freight and Insurance?

A. Can openers, Ocean freight and Insurance.

Q. With the exception of the amount of $482.14 the [fol. 471] balance of the four notes in these two suits covered the purchase price of cans? I'll give you that question again. With the exception of the amount of $482.14, the balance of the four notes in these two suits covered the purchase price of cans.

A. That is right.

Mr. Allison: The Plaintiff offers the note as identified by the witness as Plaintiff's Exhibit F-1.

There being no objection the same was entered in evidence and identified as Plaintiff's Exhibit F-1, and is in words and figures as follows, to wit:

PLAINTIFF'S EXHIBIT F-1

City of Tampa, State of Florida, Date of December 30, 31st, 1941.

One (1) year after date we promise to pay to the order of American Can Company, Seventy-five Thousand and 00/100ths — $75,000.00 Payable at American Can Company, 230 Park Avenue, New York, N. Y. Value received, with interest at 5 percent per annum after November 30th, 1941, payable quarterly.

Bruce's Juices, Inc., by G. P. Peer, Ass't Treas.

No. —— Due Dec. 31, 1942.
AW9 Renews #2762

(On the back thereof)

For value received, —— hereby guarantee payment of the within note at maturity, or at any time thereafter, with interest at the rate of —— per cent per annum until paid, and hereby waive presentment for payment, Protest and Notice of Protest.

| | | |
|---|---|---|
| Mar 31 1942 | Paid Int. to 2-28-42 | $937.50 |
| June 1 1942 | Paid Int. to May 31 1942 | $958.33 |
| Sep 2 1942 | Paid Int to Aug 31 1942 | $958.33 |
| Dec 4 1942 | Paid Int to Nov. 30 1942 | $947.92 |

[fol. 472] The Plaintiff states for the record that it has present the original Plaintiff's Exhibit A-1, being the $12,000.00 note, the original Plaintiff's exhibit B-1, being the $19,799.97 note; and Plaintiff's exhibit D-1, being the $7,039.25; note all of which have heretofore been offered in evidence, and are available for any reference or examination. (All the exhibits herein are held by Counsel, by

stipulation and agreement between Counsel). (There was no cross-examination of this witness).

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Mr. Allison: The Plaintiff now offers in evidence Plaintiff's exhibits E-1 and E-2, heretofore marked for identification, I believe on February 15, 1943.

PLAINTIFF'S EXHIBIT E-1

Wilkins & Harvey

Certified Public Accountants

Suite 513 Maas Office Bldg.
Tampa, Fla., October 31, 1941

American Can Company, Tampa, Florida.

DEAR SIRS:

We are making an audit of the books of Bruce's Juices, Incorporated. For the purpose of confirmation only, kindly give us in the enclosed stamped envelope the information requested below, as at the close of business August 31, 1941.

| | | |
|---|---|---|
| (A) | Their books show due by you<br>Discount on Cans | $4,070.09 |
| (B) | Their books show due you<br>Unsecured Notes, 12-31-41 | $ 75,000.00 |
| | 11-24-41 | $19,799.97 |
| | (American Can Co. Southern), 11-24-41 | $ 7,039.25 |
| (C) | Notes payable in your favor,<br>Secured, See Schedule Attached | |
| (D) | Open Account | $18,581.96 |
| (E) | Cash on Deposit | $ ——— |
| (F) | Collateral Security, See Schedule Attached | |

[fol. 473] If your records agree with the balance shown above please sign and return this confirmation to us.

If your records do not agree with the balance shown, please forward us an itemized statement of the account as shown by your records.

Yours very truly, Wilkins & Harvey, by B. J. Harvey, Accountant in Charge. Request Approved, Bruce's Juices, Inc., by J. Adams Bruce.

Confirmed: ——. —— ——, by ——.

[fol. 474]

PLAINTIFF'S EXHIBIT E-2

Bruce's Juices, Incorporated
Tampa, Florida

Notes Payable, Secured
August 31, 1941

American Can Company

| | | Security | Date | Due | Amount | No. of Note |
|---|---|---|---|---|---|---|
| 3000 | Cs. 24/4½ | Unsw. Grapefruit Juice | 12/14/39 | Demand | $1,462.50 | 16 |
| 2400 | " 24/6 | Orange Juice | 11/20/40 | " | 1,170.06 | 33 |
| 3810 | " 24/6 | Orange Juice | 3/ 6/41 | " | 1,857.37 | 34 |
| 2482 | " 24/4½ | Sw. Grapefruit Juice | 5/ 4/40 | " | 1,209.98 | 35 |
| 5056 | " 24/6 | Orange Juice | 12/ 4/40 | " | 2,464.80 | 38 |
| 3490 | " 24/6 | Orange Juice | 5/20/40 | " | 1,701.38 | 39 |
| 2472 | " 24/6 | Orange Juice | 12/ 4/40 | " | 1,205.10 | 40 |
| 1500 | " 12/3 | Sw. Grapefruit Juice | 1/28/41 | " | 1,365.01 | 55 |
| 50 | " 12/3 | Sw. Grapefruit Juice | 1/25/41 | " | 46.89 | 57 |
| 715 | " 24/6 | Sw. Grapefruit Juice | 7/10/41 | " | 446.06 | 61 |
| 200 | " 24/4½ | Tomato Juice | | | | |
| 1400 | " 24/6 | Sw. Grapefruit Juice | 2/20/41 | " | 682.51 | 63 |
| 600 | " 24/2 | Sw. Grapefruit Juice | 2/20/41 | " | 562.50 | 64 |
| 3300 | " 24/6 | Unsw. Grapefruit Juice | 2/24/41 | " | 1,608.75 | 66 |
| 2200 | " 24/6 | Unsw. Grapefruit Juice | 2/25/41 | " | 1,072.50 | 68 |
| 1100 | " 24/6 | Unsw. Grapefruit Juice | 2/25/41 | " | 536.25 | 69 |
| 2300 | " 24/6 | Unsw. Grapefruit Juice | 2/26/41 | " | 1,121.25 | 70 |
| 1525 | " 24/6 | Orange Juice | 3/ 4/41 | " | 1,718.44 | 71 |
| 2000 | " 24/6 | Unsw. Grapefruit Juice | | | | |
| 1200 | " 24/6 | Sw. Grapefruit Juice | 3/ 5/41 | " | 585.00 | 72 |
| 1900 | " 24/6 | Sw. Grapefruit Juice | 3/ 6/41 | " | 926.25 | 74 |
| 200 | " 24/6 | Sw. Grapefruit Juice | 3/10/41 | " | 2,120.63 | 78 |
| 4150 | " 24/6 | Unsw. Grapefruit Juice | | | | |
| 2350 | " 24/6 | Unsw. Grapefruit Juice | 3/10/41 | " | 1,145.63 | 79 |
| 3600 | " 24/6 | Unsw. Grapefruit Juice | 3/11/41 | " | 1,755.00 | 80 |
| 2600 | " 24/6 | Unsw. Grapefruit Juice | 3/12/41 | " | 1,267.50 | 81 |
| 250 | " 24/12 | Orange Juice | 3/14/41 | " | 251.25 | 83 |

PLAINTIFF'S EXHIBIT E-2—Continued

Bruce's Juices, Incorporated
Tampa, Florida

Notes Payable, Secured
August 31, 1941

American Can Company

| | | | Security | Date | Due | Amount | No. of Note |
|---|---|---|---|---|---|---|---|
| 1200 | " | 24/6 | Sw. Grapefruit Juice | 3/17/41 | Demand | 609.38 | 84 |
| 50 | " | 24/6 | Combination Juice | | | | |
| 1000 | " | 12/3 | Unsw. Grapefruit Juice | 4/ 1/41 | " | 1,453.12 | 85 |
| 450 | " | 6/10 | Unsw. Grapefruit Juice | | | | |
| 1800 | " | 24/2 | Unsw. Grapefruit Juice | 4/25/41 | " | 3,121.88 | 86 |
| 1100 | " | 12/3 | Unsw. Grapefruit Juice | | | | |
| 600 | " | 24/2 | Orange Juice | 4/29/41 | " | 765.00 | 87 |
| 850 | " | 12/3 | Orange Juice | 5/ 1/41 | " | 1,862.81 | 88 |
| 300 | " | 24/2 | Citrus Salad | | | | |
| 2260 | " | 12/3 | Unsw. Grapefruit Juice | 5/ 2/41 | " | 2,669.63 | 89 |
| 1700 | " | 12/3 | Orange Juice | 5/ 5/41 | " | 2,645.63 | 90 |
| 2300 | " | 24/2 | Unsw. Grapefruit Juice | 5/10/41 | " | 2,242.50 | 91 |
| 3000 | " | 24/2 | Unsw. Grapefruit Juice | 5/12/41 | " | 2,925.00 | 92 |
| 1700 | " | 24/2 | Unsw. Grapefruit Juice | 5/15/41 | " | 1,657.50 | 93 |
| 700 | " | 24/2 | Orange Juice | 6/18/41 | " | 1,076.25 | 94 |
| 240 | " | 12/3 | Orange Juice | 6/27/41 | " | 459.00 | |
| 160 | " | 12/3 | Orange Juice | 6/30/41 | " | 306.00 | |
| 900 | " | 24/6 | Orange Juice | 6/30/41 | " | 438.75 | |
| 235 | " | 12/3 | Orange Juice | 7/ 2/41 | " | 449.44 | |
| 160 | " | 12/3 | Orange Juice | 7/ 9/41 | " | 306.00 | |
| 270 | " | 12/3 | Orange Juice | 7/18/41 | " | 516.37 | |
| 950 | " | 24/12 | Orange Juice | 7/21/41 | " | 1,083.00 | |
| | | | Total Due American Can Company | | | $52,869.87 | |

[fol. 475] Mr. Fowler: I have no objection to E-1 and I want to ask a question about E-2. What was the testimony at the time that was introduced? It does not make any difference. There is no objection.

Mr. Allison: In the present state of these consolidated cases Nos. 23454 and 23569, Law, the Plaintiff concedes and offers to stipulate on the record that the Defendant, for the purposes of the pre-trial conference, has the right to rebut by competent material and relevant testimony, if any it has, the evidence heretofore adduced by the Plaintiff, as prima facie justification for quality discounts, which Plaintiff admits it allows to its purchasers of Packers cans, under the terms, conditions and provisions set forth in its contracts, identified herein as Defendant's Exhibits 3 to 28-A, inclusive, and under the facts and circumstances appearing from Plaintiff's exhibits 2 to 14 inclusive, dated April 2, 1943; and, in the event such facts are adduced by the Defendant in rebuttal of the Plaintiff's prima facie proofs of justification of such discounts, then the Plaintiff further concedes that it is within the province of the Court to pass upon and determine the legal sufficiency of all of the facts adduced by the Plaintiff and Defendant at the pretrial conference for the purpose of determining whether or not there are issues in these consolidated cases to submit to a jury, or for the purposes of making up issues to submit to a jury, and this statement is not a waiver of any proof or admission for the purpose of dispensing with proof of any if the defenses interposed by the Defendant.

Mr. Fowler: By accepting the statements of counsel, to clarify, will ask them if that statement does not admit that the discounts were given, and that the burden of justifying these discriminations is upon the American Can Co. to make them legal under the Robinson-Patman Law. That is, [fol. 476] Mr. Allison, Plaintiff, submits that the statement and proposal speaks for itself.

Mr. Fowler: If the Court please, this being entirely a new matter injected, which the Defendant had no way of anticipating, and the position that we will take upon it being a matter that requires some consideration, may I, before this hearing is closed, state the Defendant's position on this matter to the Court at that time instead of now?

Court: Yes sir.

Fowler: For the purpose of eliminating down, and avoiding going through a great deal of evidence that is already

before the Court, primarily the testimony taken in New York City on April 1st and 2nd, I will ask if it is agreed by counsel for the Plaintiff that that evidence does show that quantity discounts were given to the California Packing Company, Stokeley Bros., Inc.; Libby-McNeil & Libby; Hawaiian Pineapple Co., The Great Atlantic & Pacific Tea Company, and The Morgan Packing Company.

Allison: The Plaintiff admits that the quantity discounts on sales of packer's cans were allowed by Plaintiff to the named purchasers pursuant to the terms and conditions of the contract offered in evidence as Defendant's exhibits 3 to 28-A, and that such discounts were allowed under the circumstances shown by the Plaintiff's proofs of justification on those discounts.

Mr. Fowler: In view of Counsel's statement, we will decide later whether it will be necessary and to what extent, to read the testimony to the Court which is already before the Court.

Mr. Allison: That is quite agreeable to us, during any time during the course of these proceedings.

Court: Can you stipulate what the Attorney's fees should be?

Mr. Fowler: I don't know, Judge, he has not asked me.

Court: What is your idea as to what the Attorney's fees should be?

[fol. 477] Mr. Allison: If the Court please, in view of the questions involved, which have required not only initial hearings and arguments before this Court, but have required considerable travel on the part of Counsel, I am under the impression that the reasonable fee would exceed the customary nominal fee that is usually considered on notes where there is no contest, or a contest which does not involve unusual work or travel.

Mr. Fowler: I congratulate Counsel on being able to consider a fee of $1,500.00 a nominal fee.

Mr. Allison: Thank you!

Mr. Allison: The Plaintiff rests this prima facia case with the exception of that point.

Mr. Allison: If the Court please, in order to eliminate any doubt, do I understand that for the purpose of this conference the Court considers as in evidence before it, the testimony which we have heretofore taken and has been filed with the Clerk?

Court: Yes, Sir.

Mr. Fowler: We are not willing to agree that that should be done now without going through the formality of introducing it in evidence and marking it as such as adduced by Mr. Allison. The three notes involved in Case No. 23434 were offered in evidence in a hearing in New York, and the offer was objected to by the Defendant and the objection has not yet been ruled upon.

Mr. Fowler: What was the ground of the objection?

Mr. Allison: I think you said immaterial and irrelevant.

Mr. Fowler: The question arose here that the notes did not have stamps on them. I do not know what legal effect it has.

Mr. Allison: The witness testified at some length that those were all renewal notes, and that the renewal notes containing the stamps were retained by the American Can Co. [fol. 478] to save the Defendant the cost of putting the stamps on the renewal notes. Mr. Snyder testified to that effect.

Mr. Fowler: We still hold the stand on our objection. I am not familiar with what the law says on that point. Did I renew my objection to introducing them in evidence without the stamps? To be frank with the Court, I don't have knowledge of what the law is on it, but we are not waiving anything.

Mr. Allison: I will be glad to produce the law now or later, if the Court pleases, and the statute which specifically provides that the renewal notes, which are attached to the original notes bearing the stamps, do not require documentary stamps.

The Court: All right.

Mr. Fowler: That is my only ground of objection.

The Court: You said something about arguing the thing later. There is no use in going back over that evidence now.

Mr. Fowler: If the Court please, for the purpose of keeping our position as clear as possible, we have here a Mr. Davidson, of New Orleans, present, who was a distributor of Bruce's Juices in part of Louisiana and part of Mississippi. What we would like to do, subject to the Court's views, is to put Mr. Bruce on the stand to testify to certain matters which we think are pertinent in connection with Mr. Davidson's matters and then let Mr. Davidson testify; then

put Mr. Bruce back on the stand to finish his testimony, if there is no objection.

[fol. 479] The Court: All right.

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Thereupon the defendant to maintain the issues on its behalf, did there produce and cause to be sworn in as witness:

J. Adams Bruce, who testified as follows:

Direct examination.

By Mr. Cody Fowler:

Q. You are Mr. J. Adams Bruce that testified previously in this hearing, are you not?

A. Yes, sir.

Q. You are the President of Bruce's Juices?

A. Yes, sir.

Q. I will state that, while we all know it is a matter of fact, yet the record does not disclose the business that Bruce's Juices is in, except incidentally. In a very general way, tell us what business Bruce's Juices is engaged in.

A. Bruce's Juices is engaged in the processing and canning of food products, particularly those associated with fruit and vegetable juices. Also deals in by-products of fruits and vegetables.

Q. What two general classes of trade does Bruce's Juices serve?

A. In our canned goods line, Bruce's Juices is distributed in two different fields. The first is called the Grocery Field where Bruce's Juices distributes cans of fruit and vegetable juices, similar to those cans seen ordinarily on any grocery shelf. It is in competition with other canners and in the field uses cans of the same grade and quality as used by other canners. It markets its products in interstate commerce, in the various States of the United States.

The second type of distribution is one in which it started pioneering in 1937, in the season of 1936-37, and is known [fol. 480] as the individual service juice.

These individual service juices are in sizes generally ranging from four and one-half to six ounces. The method of distribution used by Bruce's Juices in this type of dis-

tribution, was different and distinct from that used for its grocery distribution.

The cans shown on the desk are typical of the cans used by Bruce's Juices.

Mr. Allison: I object to the witness' statement and move to strike it unless the record shows what cans the witness refers to, and which are not in evidence.

Mr. Fowler: I do not know how many of these we have.

By the Witness: There are plenty of them.

Mr. Fowler: All right. I will introduce them in evidence in a minute.

Mr. Allison: I have no objection as to the time you select, but I do not think the witness is qualified to refer to them until they are offered in evidence.

Mr. Fowler: This is a rather informal hearing. I have seen authorities that you can even introduce hearsay testimony at a pre-trial conference.

The Court: If you want to offer those in evidence, you may introduce them in evidence and I suppose there will be no objection, Mr. Fowler.

Q. Mr. Bruce, I hand you a can and ask you what it is.

A. It is a six fluid ounce can of apple juice in the Bruce's Juices can.

Q. What is the diameter of the can?

[fol. 481] A. 202 by the trade definition of diameter, and that means two and two-sixteenth inches.

We will be using that continually. I would like to point out that we have been instructed by the American Can Co. that sizes or dimensions of cans are given in inches and sixteenths of an inch. This can is 202. That means it is 2 2/16" in diameter. This is 314. That means 3 14/16" in heighth.

Q. Is it customary for you to have the juice in the can indicated on the outside of the can?

A. It is not indicated on the cylindrical portion of the can when the can is lithographed, but on the lid.

Mr. Fowler: I now offer in evidence the can described by the witness.

Mr. Allison: To which the plaintiff objects upon the following grounds:

1. It is immaterial and irrelevant to the issues or possible issues in this case.

2. It is not shown that the exhibit has any relation whatsoever to the notes now in the suit.

The Court: I think you had better show that. If it has not, we are not interested in it, of course, if the indebtedness was not the purchase of this size cans.

Mr. Fowler:

Q. Mr. Bruce, for how many years has the Bruce's Juices been purchasing small cans from the American Can Company?

A. Since the season of 1936-37 and until 1942.

Q. During that period of time what various sizes of cans have been purchased by Bruce's Juices from the American Can Company?

A. Among others the 202 x 314.

[fol. 482] Q. You might as well mention the others.

A. 202 x 312; 202 x 310; 202 x 300. There are other sizes in the grocery field which I will be glad to include.

Q. You are now referring at this moment only to what is known as the little can, or the individual service can?

A. That is correct, yes sir.

Q. Was the one before you now, and the one described, purchased from the American Can Co.?

A. All of our cans in which apple juice was packed were purchased from the American Can Co., and I presume this is the one purchased from the American Can Co.

Aside from the ones purchased from the American Can Co. we purchased a very small amount, something like 100,000 cans, from the Continental Can Co. I am not familiar with the American Can Co. marks. I don't know whether this happens to be one of the American Can Co. or Continental cans. If this is not, we can quickly get you one that is American Can Co.

Mr. Fowler: The purpose of the interrogation is to show the size of the can so as to show the Court the sizes sold by Bruce's Juices and likewise to demonstrate what it is contended by the Defendant was a discrimination against Bruce's Juices in the sale of these small cans by showing the relative sizes of the same sold under the various circumstances to Bruce's Juices and to Bruce's Juices' competitors.

By the Witness: I have a can here which I can positively identify as of American Can manufacture, and this is a 202 x 314.

Mr. Fowler:

Q. I note on the lid that in on the top it is marked "Grapefruit Juice".

A. Yes sir.

Mr. Fowler: I now offer in evidence the can last produced by Mr. Bruce and again identified by him.

[fol. 483] Mr. Allison: I would like to ask the witness a question in connection with the exhibit.

Q. Mr. Bruce, do you testify that you did purchase this can from the American Can Co.?

A. Yes, sir.

Q. When?

A. Between January 1939 and May, 1942.

Mr. Allison: The plaintiff renews its objection upon the grounds states. And the further ground that there is no connection established by the witness between the proffered exhibit and the notes in the suit. If the can was bought subsequent to the creation of the notes in the suit, it would of course have no bearing on this litigation.

Mr. Fowler: It certainly would illustrate to the Court the size of the can. The purpose of the introduction of this exhibit is to show the Court the size of the 314 can, which I will say we will prove was purchased for some years from the American Can Co. and which the witness testified that it was purchased between those two dates.

The Court: I don't remember whether he testified that this indebtedness was for cans of this character or not. If it is for these cans of this size and character, and if it is a part of this indebtedness, it is admissible.

Mr. Fowler:

Q. Mr. Bruce, do the notes evidence the purchase price of any particular size of cans you purchased from the American Can Co.?

A. There is nothing on the face of the notes that shows what size they were.

[fol. 484] Q. During that period you purchased a certain size can?

A. It was purchased during a certain period.

Q. Did you run a separate account on the grocery can and on the soft drink can, or small and large?

A. No sir.

Q. The notes themselves simply represent that account, irrespective of the size of the cans?

A. Yes sir, the blanket way.

Q. In a blanket way. In other words there was no distinction made in your account between the large and small cans, I mean in the indebtedness?

A. Not while the notes were accruing.

Q. In other words the notes in question are for the purchase price of both large and small cans?

A. That is right.

Mr. Fowler: I once more offer the can in evidence.

Mr. Allison: The Plaintiff renews the objection. The Defendant has failed to connect the profferred exhibit with the notes in this case, or even stated with any definiteness when this exhibit was bought.

By the Court:

Q. Is this can here which you are attempting to offer in evidence of the same kind, character and size as some of the cans purchased or represented in the indebtedness evidenced by the notes?

A. Yes sir.

The Court: All right. I think it is admissible then, if that is the case.

Thereupon the can was marked in evidence as Defendant's Exhibit C-1, (which exhibit will be certified and presented to the Court under proper procedure).

Mr. Fowler:

Q. Mr. Bruce, I now hand you a can and ask you to identify it.

[fol. 485] A. This is a 202 x 314 can. The one that we offered is a one colored can. This is a two colored one. This is another exhibit. This is a 202 x 314 can with two colors, purchased from the American Can Co. and typical of those purchased which are represented in the notes.

Q. What juice was canned in that can?

A. Orange juice.

Mr. Fowler: I now offer in evidence the second can as Defendant's Exhibit C-2.

Mr. Allison: To that the Plaintiff objects on the grounds:

1. That the exhibit is immaterial and irrelevant to the cause:

2. That it is not connected in any way with the indebtedness herein sued upon:

3. There is no allegation in the pleas to support the introduction of such an exhibit:

4. It is immaterial and irrelevant if introduced for the purpose of showing what was contained in the can or the number of lithographed colors on the can, as having nothing to do with the issues in this case.

The Court: Objection overruled.

Thereupon the said exhibit was marked as admitted in evidence as Defendant's Exhibit C-2 (which exhibit will be certified and presented to the Court under proper procedure.)

Mr. Fowler:

Q. I now hand you a can, Mr. Bruce, and ask you to identify it, please.

A. This is a 202 x 312 can, purchased from the American Can Co.

[fol. 486] Q. Is it a type of can represented by at least a portion of the indebtedness which the notes in evidence evidence?

A. Yes sir.

Q. What kind of juice was put up in that can?

A. Tomato juice.

Mr. Fowler: We now offer the can in evidence, identified by the witness, as Defendant's Exhibit C-3.

Mr. Allison:

Q. Mr. Bruce, did you buy this 312 can after the Spring of 1939?

A. No.

Q. Do you know what part of the indebtedness represented by the notes was created after you ceased using this can?

A. After we ceased using this can? We used this can for probably quite sometime during 1939. I should say that can was probably sold in late 1939.

Q. I do not mean sold by you. I mean after you ceased buying that size from the American Can Co. what portion of the present indebtedness was created?

A. What portion was created after we stopped buying?

Q. Yes sir.

A. I don't know, but probably some portion was.

Mr. Allison: The Plaintiff renews its objection to this on the same grounds as to the two preceding exhibits.

The Court: Objection over-ruled.

Thereupon the said exhibit was marked in evidence as Defendant's Exhibit No. C-3 (which exhibit will be certified and presented to the Court under proper procedure).

Mr. Fowler:

Q. Mr. Bruce, I now hand you a can and ask you to iden-
[fol. 487] tify it, please.

A. This is a 202 x 309, a can purchased from the American Can Co. and the original lithographing is somewhat scarred and I have drawn over the top of the can a representation of it; but the bottom of the can is marked with the American Can Co. identifying mark and the top of the can bears the lid sold us by the American Can Co. in connection with the purchase of these cans.

Q. Does the same fact regarding the purchase price of this type of can apply as to the other cans with reference to the notes?

A. That can was purchased in 1937 prior to the extension of credit by the American Can Co.

Q. Was that type and size can purchased after that time?

A. No. We were quoted on it and would have liked to have used it but the quotations were out of line and not in keeping with the American Can Co.'s contract and we were unable to use it.

Mr. Allison: I move to strike the testimony of the witness as having no bearing on the issues in this case and being predicated on evidence by the witness' testimony which is not the best evidence on the point.

The Court: If the indebtedness on the note does not represent the purchase of any can of that size we are not concerned with that can. I don't see why we would be.

Mr. Fowler: If the Court please, that can shows a size [fol. 488] of can, and it, in our opinion, confirms our claim of discrimination in the price put on that can as compared with the other cans. It lets the Court see what the size of the can was that was used at the various times, and gives the Court a clear understanding and impression of what was actually done and the effect of it by those things where we contend were discriminations by the American Can Co.

May I ask the Court to let it go in for what value it *it* has and if the Court, at the end of the testimony, thinks that it should go out, to strike it at that time?

The Court: I do not think it is admissible. I will sustain the objection.

Mr. Fowler: All right. I will announce that I will offer it at a later time in the testimony.

Q. Mr. Bruce, I hand you a can and ask you please to identify it.

A. This is the 202 x 300 can purchased from American Can Co. during 1939 and the purchase price of cans such as this is part of the monies referred to in the notes.

Mr. Fowler: I now offer the can in question in evidence and ask that it be marked Defendant's Exhibit C-5.

Mr. Allison: To which the Plaintiff objects upon each of the several grounds enumerated in the preceding objections.

The Court: Objection overruled.

Thereupon the said exhibit was admitted in evidence and marked Defendant's Exhibit C-5 (which exhibit will be certified and presented to the Court under proper procedure.)

[fol. 489] Mr. Fowler:

Q. Mr. Bruce, where is the plant of Bruce's Juices located?

A. Tampa, Fla.

Q. How long has it been located here?

A. Since 1928.

Q. From what Company have you purchased your cans since that time?

A. From the American Can Co. up until Dec. 31, 1942.

Q. I believe you stated that you did purchase a few cans from the Continental Can Co.?

A. In the Spring of 1942 we purchased about 100,000 cans which is a very small lot, from the Continental Can Co.

Q. Was the American Can Co. aware of that?

A. Yes sir.

Q. What was their position on your purchases from the Continental Can Co. when you had a contract with the American Can Co.?

A. The cans were lithographed and bought from the Continental Can Co. after discussing the matter with the American Can Co. and finding that they were quite agreeable toward the purchase being made from the Continental Can Co.

Q. Where does the Bruce's Juices also can juice in addition to Tampa?

A. Bruce's Juices cans juice in Bridgeville, Delaware; Geneseo, N. Y. and Houston, Tex., and has juice canned for it in its individual service cans in Vincennes, Indiana.

Q. You said that you had Bruce's Juices canned in Texas. Is that correct?

A. In Santa Rosa, Texas.

Q. How far is that from Houston?

A. About 350 miles.

[fol. 490] Q. Where is Santa Rosa located?

A. In the Rio Grande Valley down on the Mexican border and close to the Engleman Gardens, which are also located in the Rio Grande Valley.

Q. Generally where is the individual service can marketed to the public—through what outlet?

A. Individual service was established with the idea of marketing through soft drink stands, or generally wherever soft drinks like Coca Cola are sold.

Q. Is juice that is put up in cans represented by those in evidence referred to as individual service cans?

A. Yes sir.

Q. Previous to the introduction of the individual service can, how was soft drinks put up and sold?

Mr. Allison: I object to that question as immaterial and irrelevant—"How soft drinks were put up and sold."

Mr. Fowler: It shows the market that we went into and gives a picture of it—that they broke in with the cans into the market field where it had only been glasses service before, and shows the background.

The purpose of this hearing is to simplify the issues and decide on what issues should be made up, in addition to the pleas which were in evidence, and which were attacked and we are not, as a matter of fact, restricted to the pleas, altho

we believe that the pleas are quite sufficient to include this evidence.

The Court: I do not know that it makes any difference about what field he invaded. However, he put up soft drinks before that time. I don't think it has any materiality. I [fol. 491] think that would be just encumbering the record unnecessarily.

Mr. Fowler: All right.

Q. In what sized can did Bruce's Juices begin the marketing of fruit and vegetable juice?

A. 202 x 309—holding 5½ fluid ounces.

Q. Is that can in evidence?

A. No sir, it is not. We purchased that can during the season of 1936-37, I think, 1937-38, then in the season of 1937-38 it changed to the 202 x 312 can. That is this can here, 202 x 312, that held six fluid ounces. We purchased this can up until January 1939. But we had found in 1938 that it did not commercially hold six ounces but only five and three-quarter ounces and so, in January 1939, we began purchasing this can—202 x 314, Exhibit C-2, and we have purchased that size can since then and until the Spring of 1942 when the tin restriction order temporarily stopped the manufacture of this size of can for the time of the emergency.

We also in 1939 and in succeeding years, purchased this can—202 x 300—Exhibit C-5.

Q. What sized individual service can was universally used by those who canned juices in Florida?

A. After January 1939 the 202 x 314 was used.

Q. Will you explain the difference between the 202 x 312 and the 202 x 314?

A. The cans are identical in this way except, so I am told by the American Can Co., that the 202 x 314 is 2-16 inch taller than the 202 x 312; but I am told by the American Can Co. that they both have the same lid and the same body except for the little fractional difference in the height of [fol. 492] the body; that they are made on the same machine with the same labor costs and everything the same, the only difference being the actual cost of the tin plate that is involved in 2/16 inch in the heighth of the can.

Q. What difference is there in the juice contained between the two cans?

Q. Only a quarter of an ounce.

Mr. Allison: The Plaintiff moves to strike the testimony of the witness referring to what he was told by the American Can Co. unless the time and place of such conversation is set out and the names of the officials, agents or employes of the American Can Co. engaged in such conversation are stated.

The Court: All right. I suppose that is a valid objection.

Mr. Fowler:

Q. Mr. Bruce, will you state the time and place when you were told by the American Can Co. and by whom, what individual or individuals, the information that you have just given us regarding the difference in size between the 202 x 312 and the 314?

A. Yes sir, and in giving the information I would like to explain that I have been buying individual service cans from the American Can Co. never in small quantities—sometimes the orders were four and five million cans at a time.

I have talked with a great many officials of the American Can Co. and I am sure that I recall a number of them giving me that information; specifically I remember that in the Fall of 1938 that information was given to me, either in my office in Tampa, or on a plane going to Baltimore, or in Baltimore in the American Can Co.'s office, or in the office [fol. 493] of the American Can Co. in New York or, in some restaurant or some such place where I used to associate with this man, Mr. Len D. Jenkins, the Assistant to the General Manager of Sales of Packing cans of the American Can Co.

I would also like to say that we have had in our employ an ex-employe of the American Can Co., Mr. A. W. Proper, and Mr. Proper, during the period that we have been purchasing these 314 cans has explained to me the manner of manufacture.

Mr. Allison: The Plaintiff objects to any reference to conversation between the witness and A. W. Proper as not in any way being binding upon the Plaintiff under the facts set out by the witness.

Mr. Fowler: If Mr. Proper was not an employe of the American Can Co. at the time, his statements to you would not be relevant.

Q. Do you recall any other statements to that effect with any other representative of the American Can Co.?

A. I know there were several. I was in daily contact with many officials of the American Can Co. here in Tampa, in Baltimore and in New York.

Q. Name some of those with which you were often in conference on these matters.

A. Mr. Nugent—Mr. Jenkins.

Q. Do you know Mr. Howry?

A. And Mr. Howry, or Mr. Geier, Mr. Sarver, Mr. Slayton, Mr. Taylor and others.

Court: All right, with that explanation I will overrule the objection.

Thereupon the question and answer were read by the Reporter.

[fol. 494] Mr. Fowler:

Q. What difference in price did the American Can Co. charge Bruce's Juices between the 312 and 314 cans?

Mr. Allison: Objected to unless it is brought into some relation with the time the indebtedness sued upon was created.

Mr. Fowler: We are quite willing to go back if the Court thinks it necessary.

Q. When, Mr. Bruce, did you purchase the 312 cans of the American Can Co.?

A. In January 1939.

Q. In January 1939?

A. We purchased cans of both 312 and 314 heighth from the American Can Co. in 1939 and we paid eighteen cents per 1,000 more for the 314 than we did for the 312, that is, the price on both cans was f.o.b. Baltimore, freight equalized with Tampa, and the price on the 314 on that basis was 18¢ higher than the price on the 312.

Q. That is 9¢ for each 1/16 inch differential in height?

A. Yes sir.

Mr. Allison: The Plaintiff objects to the form of the question and the answer and moves to strike the same if it is intended to convey an impression that the ratio of 9¢ per sixteenth of an inch is sought to be binding upon

any statement made by the American Can Co. as establishing the scale of prices.

Mr. Fowler: We simply point out that the charges being 18¢ for these cans which were 2/16 inches in height—dividing eighteen by two which would be one sixteenth.

[fol. 495] Mr. Allison: That is all right if the witness desires to draw a conclusion but I want it understood that he is not seeking to establish that as being information conveyed by the American Can Co.

Mr. Fowler: That is evidence of what price the American Can Co. did charge for the cans 9/16 multiplied by nine—that is what they did. We are testifying only about facts.

The Court: All right—go ahead.

Mr. Fowler:

Q. When did you purchase the last 312 cans from the American Can Co.?

A. During January 1939.

Q. Was the American Can Co. aware of your change at that time from the 312 can to the 314 can?

A. Yes sir, we discussed that with them during the Fall of 1938 and we had pointed out to them since they had been supplying us with the 312 for sometime, that, as it would not commercially hold six fluid ounces, and since our method of distribution had been tied in, and our extensive advertising had been tied in with the six fluid ounce feature, that even though it did cost us slightly more, we wanted to use a can which would hold six ounces, so that there would be no deception, and in October 1938, I think, probably the latter part of October, 1938, we notified them that we were changing from the 312 to the 314 can, and in November they quoted us a price on the 314 cans at 18¢ per 1,000 higher than on the 312 can.

Q. Where did you use the individual service cans, or rather, where did you pack juice in the individual service cans?

[fol. 496] A. As stated, we packed it in Tampa, Fla.; Bridgeville, Del.; Geneseo, N. Y. and Vincennes, Ind., and it was a perfectly feasible thing for us to do business upon what the American Can Co. advised us their pricing policy was.

Q. What do you mean by the pricing policy of the American Can?

A. The pricing policy of the American Can Co. which they advised me they sold cans on, was that they sold cans f.o.b. at the point of the factory of manufacture, and equalized the freight with the factory or basing point of their competitor nearest to the point of delivery of those cans.

Q. Does the American Can Co. have a factory in Tampa, Fla.?

A. Yes, sir, and also the Continental Can Co.

Q. I believe it is already in the testimony that the Continental Can Co. is the next competitor of the American Can Co.

A. Yes sir.

Q. Please explain how the pricing policy referred to of the American Can Co. mentioned, actually worked out, and did they apply this policy to the 312 can after January 1939 and subsequent years during the period in controversy here.

Mr. Allison: The Plaintiff objects to the question on the grounds:

1. It calls for a conclusion of the witness.

2. It is immaterial and irrelevant because it is my recollection that the witness testified that after January 1939 that he changed over to the 314 can, and the 312 can would be immaterial from that date.

Mr. Fowler: If the Court please, there is evidence in [fol. 497] the record which I will be glad to read to the Court, to the effect that the difference in size does not mean a change in the grade quality of the cans; that these cans were both known to the trade as six ounce cans; that they were marketed in the same field; that they were competing with each other in the same market. We have got to begin somewhere to show the Court the discrimination in connection with the 312 can which is one of the bases of our litigation of discrimination.

Mr. Allison: The plaintiff renews the objection. It appears that the Defendant did not place the order for the 312 cans.

2nd—By Defendants own exhibits we call your attention to the fact that the 312 can is marked 5¾ fluid ounces.

The Court: I will let him answer the question. Objection overruled.

(Last question was read to the Witness.)

A. That can be explained by the use of this map.

Mr. Allison: The Plaintiff objects to the reference to the map unless it is offered in evidence.

Mr. Fowler: I believe that the witness can illustrate with sketch of the United States without introducing it in evidence, but we will be glad to introduce it as evidence.

Court: Go ahead, and use it and then you can offer it in evidence at the conclusion.

A. The American Can Co. had a plant located at Baltimore, Md. and for the most part we purchased these individual service cans from the American Can Co. for use [fol. 498] along the Eastern Seaboard that were made at Baltimore, that is, the 309 cans, the 312, the 314 and the 300 cans were all made in Baltimore. After the Fall of 1937, with a single exception, all of these cans were sold to us for our operations, in Tampa, where both the American Can Co. and Continental Can Co. have factories, on a pricing basis f.o.b. Baltimore, carload or water rate of freight equalized with Tampa, Fla. That means that although the cans were made in Baltimore, we paid the same price in Tampa for them as we paid in Baltimore.

That applied during 1938 and January 1939 on the 202 x 312 cans; also in 1939 and from then until 1942 on the 314 can and the 300 can during such time as we bought them.

In our operation we also packed at Geneseo, N. Y. and those cans were made in Baltimore, and they were shipped to Geneseo, N. Y. and they were shipped on the basis f.o.b. Baltimore, freight equalized with Fairport, N. Y. where the American Can Co. had a can manufacturing plant, that being the closest can manufacturing plant of any one to Geneseo, N. Y. And when we packed in Bridgeville, Del. those cans were made in Baltimore and we were charged the same f.o.b. price at Baltimore and we paid the freight from Baltimore to Bridgeville. And when we packed in Santa Rosa, Tex. those cans were made in Houston and the pricing policy of the American Can Co. was followed out in that we paid the price f.o.b. Houston for those cans and paid the freight from Houston to Santa Rosa.

Q. Who did?

A. Bruces' Juices.

Q. To clarify this, those cans that you bought at Geneseo, N. Y. were made in Baltimore?

A. Yes sir.

Q. And they were billed to you with freight from Baltimore to Geneseo with a credit with what would be the [fol. 499] equivalent freight from Baltimore to Fairport, where they had a factory?

A. They were made in Baltimore and of the freight from Baltimore to Geneseo, the American Can Co. paid that portion which equalized the freight from Baltimore to Fairport and Bruce's Juices paid only that small portion which represented the freight from Fairport to Geneseo.

Q. Although the cans had never been in Fairport?

A. I doubt it.

Q. You mean they came from Baltimore?

A. The- came from Baltimore direct to Geneseo, and not through the Fairport Plant.

Q. When you bought the cans for Bridgeville, Del. what freight did you pay on those cans?

A. We paid the f.o.b. price Baltimore, plus the freight from Baltimore to Bridgeville, Del. That is, when those cans were made in Baltimore, according to the pricing policy of the American Can Co. they cost us more a few miles from Baltimore than they did down in Tampa, Fla.; the cans in both instances having been made in Baltimore, Md.

Thereupon the Hearing was adjourned until two o'clock P. M., October 6, 1943, at which time the following proceedings were had and testimony taken:

Mr. Fowler: The Defendant will now withdraw Mr. Bruce and put Mr. Davidson on the stand.

Thereupon the Defendant further to maintain the issues on its behalf, then and there produced and caused to be sworn as Witness, HAROLD DAVIDSON, who testified as follows:

Direct examination.

By Mr. Fowler:

[fol. 500] Q. Your name?

A. Harold Davidson.

Q. Where do you live, Mr. Davidson?

A. New Orleans, La.

Q. What type of business are you in?

A. Wholesale distributing business, magazines, newspapers, and periodicals.

Q. You are the owner and manager and director of the H. D. Distributing Co.?

A. Yes sir.

Q. For what purpose was that Corporation organized?

A. For the distribution of fruit juices and other commodities such as chilis and soups.

Q. That is what you had sold—chilis and soups?

A. Yes sir.

Q. You handled Bruce's Juices in certain territory around New Orleans, did you not?

A. Yes sir.

Q. In what territory?

A. A greater part of Louisiana, and part of Mississippi, or in parts of Louisiana which are near Mississippi.

Q. Do you remember when you first ordered Bruce's Juices?

A. In January 1940.

Q. At that time did you order it in your own name?

A. Yes sir.

Q. Later you organized the H. D. Distributing Co. did you?

A. Yes sir.

Q. You had a contract or franchise to handle Bruce's Juices?

A. Yes sir.

Q. That was the Bruce's Juices individual service, or small can that you handled in the beverage trade, was it not?

A. That is right.

Q. What preparation did you make as Distributor in the handling of this juice, and how did you go about handling it?

A. I had a couple of trucks painted with advertisements [fol. 501] of Bruce's Juices trade-mark, and had them fixed especially for that particular work, for advertising and distributing Bruce's Juices individual service.

Q. When you first started in business did you have anything except Bruce's Juices in this Corporation?

A. No sir.

Q. Was there any advertising done by you as a distributor of Bruce's Juices?

A. Yes, sir.

Q. What was the type of advertising that you had?

A. We had bulletins, signs, personal contact and sampling.

Q. Through what outlets did you market Bruce's Juices?

A. All types of soft drink stands, filling stations, drug stores, hospitals.

Q. How was the product received by the trade?

A. Very well.

Q. Just state how you got along and what progress you made in the handling of Bruce's Juices individual service after you got started in 1940.

A. Well, for the first few months things did not come up to my expectations. What I mean by that, is that I ran into a little competition which forced me to do things that maybe I would not have done, and it cost me money to do that, but I continued on until I closed out for the duration.

Q. When did you run into this competition that you refer to, Mr. Davidson?

A. Well, I would say in March or April, 1940.

Q. What kind of progress had you made up to that time?

A. Very good.

Q. What kind of competition did you run into, and from what source?

A. We had a price of 85¢ that we strictly stood by for [fol. 502] the Bruce's Juices and they had a juice—"One-Up," a Texas grapefruit juice that sold for 80¢—of course that took the business.

Q. Was that put out by the Engleman Gardens?

A. I don't know.

Q. The name of it was "One-Up"?

A. "One-Up" Grapefruit juice.

Q. What juices of Bruce's Juices, what juices that Bruce's Juices put up, was it you handled?

A. We handled grapefruit, orange, blended, tomato juice and apple juice.

Q. In the case that you referred to of Bruce's Juices, how many cans were there?

A. How many cans in case?

Q. Yes, of Bruce's Juices.

A. Twenty-four cans.

Q. And you sold, as a Distributor, Bruce's Juices with the retail outlet at 85¢ per case for two dozen?

A. That is right.

Q. With reference to the margin of profit that a retailer gets on these little cans, is it great or small?

A. I would say it is small.

Q. How would a five cents difference on two dozen cans affect the margin?

A. His profit was small to begin with and five cents a case, his contention was it was worth quite a bit to him to get that five cents.

Q. You mean?

A. The retailer.

Q. What effect did that have when they sold only grapefruit juice—"One-Up"?

A. In a lot of cases we could not service their juice because we could not make the 80¢ price; in other words we lost the orange juice or any other that we had because [fol. 503] we could not meet the 80¢ grapefruit price.

Q. To what extent did that injure the sale of Bruce's Juices in your territory?

A. I would say that we would have sold at least 50% more in less area if we did not have the 80¢ competition.

Q. How did it affect the profit that you made?

A. It hurt me.

Mr. Allison: Objected to as immaterial and irrelevant.

Mr. Fowler: I believe in the record taken in New York and also Mr. Bruce will testify to that effect, and I believe Mr. Nugent testified to it in New York, but I will say to the Court that I will show that.

The Court: He says he will prove the "One-Up" trade mark later so let's go ahead.

Mr. Fowler:

Q. This competition at a lower price—what effect if any did it have on you extending your business in the territory in which you worked at that time selling Bruce's Juices?

A. I originally intended to service thoroughly New Orleans proper, and after I had this competition, I was forced to go out further to get business that was costly to me, in order to create the demand for Bruce's Juices, where I had no competition.

Q. Explain whether or not the price of 85¢ was stable when you did not run into the competition of 80¢?

A. Absolutely.

Q. What were your plans which you would have carried out in distributing Bruce's Juices—which you did not carry out on account of meeting this competition?

[fol. 504] Mr. Allison: Objected to as highly speculative and deals solely with the condition of his mind that might have existed, and has no bearing on the issue, and he might have been influenced by countless things, and it is too far afield.

The Court: I will let him answer the question.

(The last question was read to the Witness.)

A. My intentions, as I stated, were to work New Orleans thoroughly and not make this added territory, and it forced me to take on other items to meet the expense to make the coverage: to make further travels, and I had to take on other items in order to get my money back.

Q. Had you planned to take on other items than Bruce's Juices?

A. No, sir. I originally started out exclusively as a Bruce's Juices distributor.

Q. Did you stay in business serving Bruce's Juices in this territory?

A. Yes, sir.

Q. Will you state why you stayed in this business when you had this ruinous competition that you refer to?

A. I was under the impression from all the information furnished me that it was something that would correct itself, and that it was unprofitable for my competitors, and so I felt that if I could stay in it long enough, it would right itself.

Q. You did finally have to go out of the business of selling this individual juice, did you not?

A. Yes, sir.

Q. When was that?

A. Last part of 1942.

Q. Why did you actually close up and go out of business?

A. I was not able to get merchandise, and the help situation and War conditions in general.

[fol. 505] Had the "One-Up" competition gone out by that time?

A. The "One-Up" was out before I went out; that is, they didn't have any of it on the market.

Q. How long have you been in the merchandizing business?

A. Twenty-odd years.

Q. Are you familiar with this territory in which you sold the juice?

A. Yes sir.

Q. From your experience in handling the juice, and from your experience as a business man in merchandize, and considering the way you had started before you ran into this competition, will you state to what extent, in your opinion, your distribution was interfered with by this 80¢ competition?

A. I would say 50%.

Q. How do you mean 50%?

A. In other words I would have sold as much merchandize as was sold in either twice the period or twice the territory.

Q. You mean you would have sold half the merchandize or twice the merchandize.

A. I sold half the merchandize after the competition.

Q. You only sold half as much afterwards as you would have?

A. Yes sir.

Q. What percentage of your area did you cover compared to the entire area that was allotted to you?

A. Approximately 20 to 25 per cent.

Q. State whether or not, if you had not ever had this competition, you would have covered the entire territory?

A. Absolutely.

Q. So you actually only worked one-fifth of your territory on account of this competition.

A. That is right.

[fol. 506] Q. Mr. Davidson, I will ask you further, why did you not cut your juice or your grapefruit juice that you were selling, to 80¢ to meet this competition?

A. I could not make any money at that.

Q. Now, Mr. Davidson, the outlet to whom you sold Bruce's Juices—had they sold fruit juices for you before that time?

A. Not the greatest part. In other words, some hotels had the juice but not individual service.

Q. The fountains and the filling stations and places like that—had they ever sold juice before?

A. No sir.

Q. In other words, you developed that territory?

A. That is right.

Q. Now did the Bruce's Juices compare in quality with the "One-Up"?

A. My own personal opinion, and the expense of sale in what territory I did cover, I would say Bruce's Juices, by far.

Q. To whom did "One-Up" sell their products?

A. They sold to the same outlet, that is—the same type of outlet that we were selling—the same trade.

Q. In other words, they went into the same market where you had, yourself.

A. That is right.

Q. And where did they get their customers?

A. By personal truck contact, the same as we received ours.

Q. Did they develop their own customers, or go into your customers?

A. Some they got, and some that were serviced by us.

Q. What effect would that competition have had if they had sold at the same price that you sold?

Mr. Allison: That is objected to as speculative and argumentative.

[fol. 507] The Court: I think it is, too, speculative. He has explained the situation of the competition.

Mr. Fowler:

Q. Now this price of 80¢ that was used by "One-Up"—did that require any additional help to you by Bruce's Juices in making your sales or developing your territory?

A. Yes, sir.

Q. Did Bruce's Juices send anybody in to help you with your territory?

A. Yes sir.

Q. What kind of assistance did they give you in this regard?

A. They had a travelling representative that came in with display material and he would go on the truck with the man and make new calls, and create new outlets, and talked the produce.

Q. To what do you refer as display material?

A. Such as putting up signs.

Q. Signs for what?

A. Advertising Bruce's Juices different juices and different display mats and stands and things to set the cans in—different types of display material.

Q. Do you know whether or not this competition did or did not require them to do some work in your territory in that regard?

A. It required us to do more work, naturally.

Q. Did it require Bruce's Juices to do more assistance?

A. Absolutely.

Q. You put out a house organ in connection with your advertising, did you not?

A. Yes sir.

Q. What was it known as?

A. Bruce's Juices.

Q. What did you do with that?

A. We distributed it to the outlets that were using it and with form letters mailed it to prospectives.

[fol. 508] Q. What type of investments did you have in this business, Mr. Davidson? Was it a substantial or a minor investment?

Mr. Allison: That is objected to as immaterial and irrelevant.

The Court: I will sustain the objection.

Cross-examination:

Mr. Allison: The plaintiff moves to strike the entire testimony of this witness upon the ground that it is immaterial, irrelevant and incompetent to the issues in this cause?

2. It is founded entirely upon speculation, based upon contingencies which did not happen:

3. It is based in a large degree, on intentions expressed by the witness which are not shown to have materialized, and the entire testimony is entirely remote from the issues in this cause.

The Court: I will reserve the ruling on it until later.

Mr. Allison:

Q. Mr. Davidson, were you subpoened here today as a witness?

A. No sir.

Q. You, I understood, were in the newspaper and periodical distribution business; and was it in that business that you had the twenty years' experience?

A. Yes sir.

Q. Then you formed the H. D. Distributing Co.?

A. Yes sir.

Q. And what year was that?

A. 1941, I believe.

Q. Was that formed for the purpose of being the organization to distribute Bruce's Juices?

A. No sir. That was formed in order to take on other merchandize to relieve the pressure that was on me from Bruce's Juices.

[fol. 509] Q. What do you mean—the pressure?

A. The cost of distribution and the added expense of additional territory that I was forced to cover when I took on other items.

Q. Then the H. D. Distributing Co. did not distribute Bruce's Juices?

A. Oh, yes.

Q. In other words you had an individual arrangement prior to the creation of the H. D. Distributing Co. which covered Bruce's Juices?

A. No sir. The H. D. Distributing Co. was me right on, only I formed that Company in order to take on additional items.

Q. At the time you formed it you were already distributing Bruce's Juices yourself?

A. That is right.

Q. When did you first make any agreement with Bruce's Juices to act as distributor?

A. In January 1940.

Q. That was when you began to distribute Bruce's Juices?

A. That is right.

Q. At that time did you have a written contract?

A. Yes sir.

Q. Did that contract specify the territory you were to cover?

A. Yes sir.

Q. Have you the contract with you?

A. No, sir.

Q. Can you tell us with fair accuracy about what area or territory the contract covered?

A. It listed a number of parishes in the State of Louisiana, and a county or two in Mississippi, but the exact counties,—to remember them off-hand—I could not do that.

Q. In other words it covered a number of parishes, which are the same thing as counties, in other States, in Louisiana?

A. Yes sir, that is right.

[fol. 510] Q. And one, or maybe several counties in Mississippi?

A. That is right.

Q. You also testified that you originally intended to serve only New Orleans?

A. No sir, we intended to continue to go on to serve the outlets as of my contract.

Q. In other words you had started around and you intended to cover the area?

A. Yes sir.

Q. Was that area extended by later contracts?

A. Yes, sir.

Q. Then actually, with or without competition, by that contract, you were supposed to cover the area which you eventually did cover?

A. I never did completely cover it.

Q. Your first few months in 1940, you testified was the time you ran into the competition from "One-Up"?

A. That is right.

Q. But you continued on with the operation?

A. Yes, sir, that is right.

Q. And until you closed up for the duration of the War?

A. That is right?

Q. And you closed up because you could not get the merchandize or the labor?

A. Yes, sir, that is right.

Q. How did your profit compare later with the first few months period.

A. That would have compared better due to the increased number of items that I was distributing.

Q. That would have been true had you been distributing those items in the first instance. Did your business increase?

A. The business increased on the other merchandize I took on.

Q. You mean by other merchandize other than canned juice and Bruce's Juices?

A. That is right.

Q. Did you sell tomato juice for Bruce's Juices?

[fol. 511] A. When I could get it.

Q. You mean that sometimes you could not get it from Bruce's Juices to sell?

A. That is right.

Q. You did not have any competition from "One-Up" on that?

A. No sir.

Q. Did you sell apple juice canned by Bruce's Juices?

A. Yes sir.

Q. You did not have any competition from "One-Up" on that?

A. No sir.

Q. In other words, you only had competition from "One-Up" on canned grapefruit juice—is that correct?

A. Yes sir.

Q. Did Bruce's Juices fill your orders on apple juice that you requested—all of them?

A. Yes sir.

Q. Did they fill all of your orders on citrus juice, grapefruit and orange juice?

A. Yes sir.

Q. These cans sold at five cents apiece by the retailer, did they not?

A. In some cases they may have gotten more, I don't know. That was the original price they were to be sold for.

Q. At 5¢ on that 85¢ case they had a 35¢ profit—did they not?

A. Yes sir—35¢.

Q. And it is your opinion here that a difference of 5¢ in that picture furnished very adverse competition to you?

A. Absolutely.

Q. Upon what did you base your testimony that you sold 50% less by reason of the competition than you would otherwise have sold?

A. We kept a chart of daily sales per dealer, and we kept a record of the amount distributed to that dealer and the [fol. 512] type of items that he bought—our tomato juice, orange juice and grapefruit juice—and the dealer, in some cases would eliminate the other brands when he was able to get "One-Up" grapefruit at 80¢—he would discontinue the other item or two that he had been taking; in other words, we were not able to sell him anything.

Q. Did you have that competition throughout all of your territory?

A. With what we covered at the beginning, but I went out of their reach when I went out with this other merchandize, for instance; potato chips. We covered a larger territory in order to make our expense.

Q. Were the distributors of "One-Up" local people just like you?

A. I don't know. I am not familiar with the Company or how it was handled or anything other than the route men and the dealer.

Q. Did that route man sell anything but grapefruit juice?

A. Not that I know of. I don't know of him selling anything else.

Q. When was this 80¢ price first put into effect by this competition?

A. It commenced in the first three or four months that I was in business. I started to get it pretty good then. Their promotion on it was pretty good at that time.

Q. Was that price in effect before you started distributing?

A. No sir.

Q. You are sure of that?

A. Yes, sir.

Q. You also stated that "One-Up" had withdrawn from the field and was out before you discontinued the business in the last part of 1942?

A. That is right.

Q. When did they go out of business?

A. I imagine a few months before I did. At least I had [fol. 513] not seen anybody for several months.

Q. Did you advise Bruce's Juices about this condition?

A. Absolutely.

Q. Did you have correspondence with them?

A. Yes, sir.

Q. Do you have that correspondence with you?

A. No, sir.

Q. In connection with the distribution of chili and the other items, did you carry on any advertising campaign?

A. You mean of the new product?

Q. Of their products; or whatever you were selling.

A. Yes, sir. The different companies would have different signs or advertisements and display material that was naturally put up in conjunction with their products.

Q. Is it not a fact that all merchandising which is progressive carries advertising with it: in other words, there is advertising a certain percentage of a year, bottled soft drinks and everything else, that they furnish certain types of display materials and billboard signs and various other advertising?

A. That is right.

Q. What did Bruce's Juices do in connection with that advertising which was not general to other merchandising?

A. One of them was making special signs to fit certain places, such as in one instance I know of an Army Hospital—we made a sign to fit a certain space on their wall where—would not allow any advertising material other than that type, and we had it made up for that particular hospital.

Q. It is not true that the cigarette manufacturers, coca cola, and various others, make all sizes and shapes of signs for different purposes?

A. Yes, sir. I guess they do make all shapes and sizes.

[fol. 514] Q. You testified that by virtue of this conpetition, the Bruce's Juices was put to trouble and expense, or in effect to that, because they sent a man over to help you, and sent advertising material—that is correct—is it not?

A. Well, they sent probably more of it than they would, but *but* they did send somebody from the beginning; but I mean they gave more assistance after the competition.

Q. Was there anything in your contract regarding help that they were giving you in establishing distribution?

A. No sir.

Q. How many men were sent over there in this connection?

A. Well, they had several representatives that came at different times.

Q. Were they covering other territories in addition to yours?

A. I don't know what territories they covered.

Q. Was there more than one there at a time?

A. Yes, sir, there has been more than one there at a time.

Q. How many?

A. Two that I know of.

Q. How long did they stay there?

A. I don't have any definite way to state that.

Q. Would you attempt to say how many weeks, days or months that these men were there all told during the period you were distributing the products of Bruce's Juices?

A. I don't know how much time they spent because they did not spend it all with me.

Q. Who did they spend it with?

A. They were out on their own and making their own contacts. I had no way of knowing what work they were doing.

Q. You mean they were making contacts with your customers?

A. Yes, sir.

[fol. 515] Q. Were those men sent out from Tampa?

A. Yes sir.

Q. Did they return to Tampa?

A. I suppose so.

Q. You don't know, though, they might have gone to Texas or Georgia?

A. I don't know where they went.

Mr. Allison: Plaintiff now requests the Defendant to produce a copy of the written contract testified to by the witness, and the correspondence testified to by the witness relating to this alleged discrimination and competition.

The Court: Do you want to give it to him?

Mr. Fowler: It is purely a question of how much the Court wants us to do and how much detail we want to go into. We have got it and we will be glad to do. We call attention to the letters that we think that he is interested in here but not our whole correspondence file.

Mr. Allison: Mr. Davidson, what size cans were these of Bruce's Juices of fruit juices and vegetable juices?

A. Six ounce cans.

Q. Were they all six ounce cans?

A. We had six ounce cans in all juices.

Q. Did you handle any other sized cans of Bruce's Juices?

A. No sir.

Mr. Fowler: Here is one letter which we have which we will hand to the witness and which we will read if they want it read.

Mr. Allison: We would like to see what it is.

[fol. 516] (The letter was handed to Mr. Allison.)

Mr. Fowler? That is the only letter we have with us and having read it I am going to ask that it be introduced in evidence so the Court may read it too.

Mr. Allison: Now, was there a reply to this letter about Bruce's Juices?

Mr. Fowler: We have not the reply here.

Mr. Allison: Do you have a copy of the reply?

Mr. Fowler: Not here.

Mr. Allison: I think possibly if these are produced simultaneously we would have no objection.

Mr. Fowler: You asked for us to produce it.

Mr. Allison: Read what I said, Mr. Johnson.

(Thereupon the Reporter read Mr. Allison's statement as follows: "Plaintiff now requests the Defendant to produce a copy of the written contract testified to by the witness, and the correspondence testified to by the witness relating to this alleged discrimination and competition.")

Mr. Fowler: We will produce the contract also. It is a letter in the form of a contract, and we will get the letter that answers the letter of Mr. Davidson.

Mr. Allison: Does this file contain a copy of the letter written in reply to that one?

Mr. Fowler: No sir.

Mr. Allison: I will say that later if you produce those [fol. 517] and you want to offer them in evidence, we will make no point that this witness is not on the stand at the time.

Mr. Fowler: But at the present time you do not want that letter introduced in evidence?

Mr. Allison: Not until I see the correspondence that accompanied it.

Mr. Allison:

Q. You received letters from Bruce's Juices, did you not?

A. Yes sir.

Q. Did you reply to them?

A. Yes sir.

Q. Would you say about how many letters were exchanged on that point?

A. Not many—very few.

Q. But several?

A. Yes sir.

Court: We will go ahead with some other witness. I suppose you are through with this gentleman?

Mr. Allison: We are unless this correspondence which is the best evidence of what was said and done, might lead to some other question. With that exception I am through with him.

Redirect examination.

Mr. Fowler:

Q. Mr. Allison stated to you that the profit of the retailer on the juice, since you sold it at 85¢ a case and you sold it for 5¢, was 35¢—did you mean that the retailer had no overhead costs?

A. That is just the gross difference of his expense of a sale—the expense of icing and handling, I don't know what percentage of that is overhead.

Q. You know he did not make 35¢ profit?

[fol. 518] A. No sir, he did not make 35¢.

Q. What size were the cans that "One-Up" sold?

A. Five and three-quarter ounce cans.

Q. Could you, as a distributor of Bruce's Juices, part of the time sell one type of juice—I mean, take orange juice or grapefruit juice in the six ounce cans and then shift back and forth between the five and three-quarter and the six ounce cans—could you do that in merchandizing?

Mr. Allison: I object to that because the witness testified that he never sold anything but the six ounce can and it is highly speculative and remote.

The Court: I will let you put it in there and you can make a motion to strike it when you finish.

Mr. Allison: On the further ground that the witness is not shown to be qualified.

Mr. Fowler: I can go back into more qualifications if you want me to. He has been in the merchandizing business for twenty years.

The Court: Let him go ahead and answer the question.

(Last question was read to witness.)

A. Not successfully.

Q. Why not?

A. The Trades' reaction to the change in size would naturally affect your sale the same as the change of any sized package.

Recross-examination.

By Mr. Allison:

Q. Mr. Davidson—Coca Cola is sold in a six ounce bottle, is it not?

A. I imagine—I don't know.

[fol. 519] Q. And Pepsi Cola is sold in a twelve ounce bottle?

A. I would not know that, either.

Q. Suppose you shift it to a five and one-half ounce can—who would have objected—do you mean your dealers or the buying public?

A. Both.

Q. And at the same time that that could not be done, "One-up" was selling five and three-quarter ounce cans at the same price that the Bruce's Juices was being sold?

A. The six ounce can.

Q. And they were sold at the same price to the consumer?

A. That is right.

Redirect examination.

By Mr. Fowler:

Q. Could you sell the same juice in the two different sized cans and then veer back and forth between them?

A. Not successfully.

Mr. Allison: With the exception of possibly desiring to interrogate the witness regarding this correspondence when it is brought we have no further questions.

And we renew our motion to strike all of the testimony on the grounds enumerated at the close of the first testimony. I understand the Court has reserved his ruling.

The Court: That is right.

End of Witness

Thereupon, the Defendant to further maintain the issue on the case, thereby recalled the witness J. ADAMS BRUCE, who further testified as follows:

Direct examination.

Mr. Fowler:

Q. Mr. Bruce, in 1939 and 1940, how many distributors would you say that you had in the general category of [fol. 520] Mr. Davidson, of Bruce's Juices?

A. About seventy-five who had exclusive territories like Mr. Davidson. They made a certain investment of their own, and perhaps panel-bodied trucks with Bruce's Juices displayed on them and salesmen selling Bruce's Juices in individual cans.

Q. What effect did this 80¢ price regarding which Mr. Davidson has testified, on "One-Up" have on the distribution of Bruce's Juices?

A. It had a very serious effect on the distribution as to the individual service cans, because our distributors were purchasing their juice upon a basis which required them to sell it at 85¢ and when they ran against "One-Up" competition, the retailer would take, in many instances, the "One-Up" Texas juice at 80¢ in preference to Bruce's Juices.

In the Fall of 1939 we proceeded to extend our distribution of individual service to the Mississippi and West of the Mississippi, and our distributor salesmen ran into that situation particularly in Texas.

We found that prospective distributors were interested in the Bruce's Juices line, consisting of orange juice, grapefruit juice, blend, and tomato juice at that time, and they were anxious to take it on and make the substantial investment that they had to as exclusive Bruce's Juices distributors of individual service, the "One-Up" Texas juice was selling at 80¢ and the distributors said we can pay such a price as will cause us to sell the juice at 85¢ for orange juice or blend or tomato juice, but on grapefruit juice how can we sell at 85¢ when "One-Up" Texas juice is selling for 80¢? We felt that the "One-Up" were having similar costs to ours, and we did not think that it would continue indefinitely. We finally, in opening exclusive distributorship in [fol. 521] Texas, sold all of our juice at 65¢, and 65¢ was

the price we were selling to the distributors and they, the distributors, were selling at 85¢ and on the bottom of the invoice we put this—"a discount of 7½% on the grapefruit juice"—which in effect made the price of the grapefruit juice 60¢ and the price of the other 65¢, and the distributors got on as best they could with that.

Q. Did you have any complaints from your distributors?

A. Yes sir, we had very serious complaints, and particularly at the end of 1939 and the beginning of 1940, when "One-Up" said they were coming out with an orange juice and a tomato juice also, and that those were going to be in 5¾ ounces and that they were going to sell at 60¢ and the retailer was going to buy them at 80¢ and so the distributors said we have been getting along fairly well with the grapefruit at 60¢ but when they bring in these others, we are going to have a 7½% discount on the orange juice and tomato juice to meet it, just as we have to have it to meet the price on the grapefruit juice. We could go down and pack it in the Valley, when we wanted it, but on the orange and tomato juice we were against it, and we told them that we could not give them the 7½% discount on it, and we lost distributor after distributor, after we had gone in at great expense and tried to build them up and help them out. They were willing to buy on an equal basis. The "One-Up" forced us out of territory after territory, after we had gone in there with Bruce's Juices and pushed the line and developed and enthused distributors, and had the distributors to make investment in Bruce's Juices, and then we had to abandon it, and that happened with distributor after distributor, not in Texas alone, but also in Louisiana, in Arkansas, in Mississippi, in Tennessee, in Alabama and in other States.

[fol. 522] Q. Did you seek to do anything about reducing your costs?

A. I did.

Q. What was it?

A. I kept in contact with the American Can Co. and told them that I had to have lower can costs in order to stay in the business, in order to keep going,—in order to meet this competition, and there are letters which have been entered in evidence—One January 2, 1940.

Q. Is that in evidence?

A. Yes sir.

Q. Just read it.

A. From Bruce's Juices, Inc. to American Can Co., Mr. Jenkins: they have already testified that Mr. Jenkins was the Assistant General Manager of Sales of the packer cans of the American Can Co.

Mr. Fowler: The exhibit number of the letter is Defendant's Exhibit No. 30.

Mr. Allison: Since the letter is already in evidence, I object to the letter being read.

Witness: I am only going to read the first paragraph—four lines.

Court: Go right ahead.

Whereupon the witness read Defendant's Exhibit No. 30, —reading the first paragraph thereof.

Witness: And the letter of Feb. 12, 1940—being Defendant's Exhibit No. 31— (Thereupon the witness read this letter—Defendant's Exhibit No. 31).

Witness: And the 7th of March, 1940—Defendant's Exhibit No. 32. There are five paragraphs of this letter and they all deal with the subject of getting the costs of cans [fol. 523] down. (Thereupon the witness read Defendant's Exhibit No. 32).

Mr. Fowler:

Q. I hand you a letter, Mr. Bruce, and ask you how you received it, and whose signature is affixed thereto?

A. I received it through mail on or about March 13, 1940. It is a letter addressed to the President, Bruce's Juices, Inc. and signed Lenn Jenkins, Assistant to General Manager of Sales, packer cans.

Mr. Fowler: We offer this in evidence and submit a copy in lieu thereof.

There being no objection thereof, the same was admitted in evidence and marked as Defendant's Exhibit F-1.

(Thereupon the said letter dated March 11, 1940 from Jenkins to J. Adams Bruce was read and is in words and figures as follows:

DEFENDANT'S EXHIBIT F-1

American Can Company

230 Park Avenue

New York

L. D. Jenkins, Asst. to General Mgr. of Sales

March 11, 1940.

Via Air Mail

Mr. J. Adams Bruce, President. Bruce's Juices, Inc.

Tampa, Florida.

DEAR ADAMS:

Answering yours of the 7th which did not arrive until late Friday afternoon. I have not had opportunity today to give this the thought that I would like to, and knowing that you expect to leave Tampa the early part of this week, and since you have requested that I let you hear from me before leaving Tampa, I am just a little doubtful of whether I can get a reply off in [fol. 524] order to meet your request. I believe it would be well if you would let me know where I can write to you later in the week, or, possibly your plans have changed. I will look for an air mail reply.

Very truly yours, (Signed) Len Jenkins, Asst. to General Manager of Sales.

Witness: To which I replied on the 13th.

Mr. Fowler:

Q. Is that your reply there?

A. Yes sir—it is only two short paragraphs.

Mr. Fowler: I offer the reply in evidence as Defendant's Exhibit F-2.

Thereupon the Defendant further stated with reference to said exhibit:

Mr. Fowler: We not offer in evidence a copy of the letter written by Bruce's Juices, Inc. to Mr. Len Jenkins in answer to the letter just introduced in evidence from Len

Jenkins to Bruce's Juices, and we would like to submit a copy of that.

Mr. Allison: I would like to interpose an objection to such letters as these—that they are immaterial and irrelevant with the agreement of counsel—that that be understood as made.

(Thereupon the said letter—Defendant's Exhibit F-2 was read by witness.) (Which said Exhibit is in words and figures as follows:

DEFENDANT'S EXHIBIT F-2

March 13, 1940.

Via Air Mail.

Mr. Len Jenkins, Asst. to General Manager of Sales, American Can Company, 230 Park Ave., New York City

[fol. 525] DEAR LEN:

Referring to yours of March 11th, I am holding to my original plan, which should put me in New York by Monday at the latest.

Will you kindly have some definite ideas ready in connection with the lowering of costs on our Litho cans.

Very truly yours, Bruce's Juices, Inc.

Witness: I went to New York as referred to in that letter and had some discussion.

Mr. Fowler:

Q. Who with—Mr. Bruce?

A. With Mr. Jenkins, and they said they would consider the matter seriously. I told them that I must have lower costs and what the situation was. We had to work it out between us before a way, in which even though it reduced the eye-appeal of the can—we cut off one color instead of having this distinctive color can that would stand up against competition—Exhibit No. C-2—in order to get our can costs cut something like 35¢, we went to this one—C-1—which cannot be seen nearly as well as this. We were losing our eye-appeal.

Q. At whose suggestion was that cut?

A. Mr. Len Jenkins was the originator of that idea.

Q. In other words you reduced your lithograph job from two to one color?

A. That is correct.

Q. And it saved you how much?

A. Thirty-five cents a thousand cans. I went to New York and talked with them and they took very seriously what I said. I talked with Mr. Len Jenkins subsequent to my letter of March 13th. I received another about what time I would [fol. 526] be in New York—Monday at the latest—and Mr. Jenkins refers to that discussion in New York in a subsequent letter, and they said they would give it serious consideration and did nothing.

I was back in Tampa and on April 4th I saw a clipping, or I saw a news item April 4, 1940, in the Tampa Daily Times, of which I have a photostatic copy here.

Q. Have you a copy of a letter in which that was transmitted?

A. Yes sir.

Q. Has not that already been offered in evidence?

Mr. Allison: What letter do you refer to?

Witness: Our letter of April 6, 1940 and Mr. Jenkin's reply of April 11, 1940.

Mr. Fowler: What hearing was that in?

A. In New York, July 21—when Mr. Jenkins was on the stand.

Mr. Allison: That is on page 53. You showed him the letter to refresh his memory.

Mr. Fowler: He said he found the letter but did not find the clipping.

Mr. Fowler: Defendant offered his answer of the 11th. We would like to offer these two letters together in evidence—the letter from Bruce's Juices to the American Can Co., attention Mr. Len Jenkins, dated April 6, 1940 which is a copy, together with a copy of the clipping which it contained. I will say to the Court that the only copy of the Times of that date that we could find was on their official rolls down there, and we made a photostatic copy of it which can be checked and we vouch for it, and would not submit it unless we know that it is correct.

[fol. 527] I offer this letter in evidence, together with the enclosed clipping as Defendant's Exhibit F-3 and as Defendant's Exhibit F-4.

Mr. Allison: We have no objection except that the newspaper clipping attached to the letter is immaterial to the issues here. It is a purported quoted statement attributed to no one, and therefore could not be binding on the plaintiff.

Mr. Fowler: If the Court please, this letter is as follows: so the Court can rule on it intelligently,—dated April 6, 1940—American Can Co., attention Mr. Lenn Jenkins:

(Thereupon the letter was read to the Court.)

The next letter is in answer to it and refers to it and that is the basis for our claim that they had made a secret low price, and it came out, and we have to tie it in and we could not do it all at once. This clipping in question, which was enclosed, is in the Tampa Daily Times Thursday, April 4, 1940.

Thereupon Counsel read the clipping to the Court.

Mr. Allison: We object to this newspaper clipping as not in any way binding upon the Plaintiff in this case.

The Court: He said he wanted to read it in order for me to understand it. There is no evidence that the Canning Company put the newspaper clipping out.

Mr. Fowler: No sir. There is evidence here that it was called to Mr. Bruce's attention that there had been a reduction of the cans and it referred particularly to Texas.

[fol. 528] The Court: It may have been put out by the Continental Can Co. or some others, and unless you are going to tie it with them—but Jenkins denied that he issued any such statement.

(After further argument, the Court stated as follows:)

He can go ahead and state what the conversation was that that he had up there, but I do not think that that is binding—what came out in the paper—unless you can prove who made the statement.

Mr. Fowler: Then we would like to offer in evidence the two letters from the parties themselves as Defendant's Exhibits F-3 and F-4.

Thereupon Defendant's Exhibits F-3 and F-4 were marked in evidence.

DEFENDANT'S EXHIBIT F-3

April 6, 1940.

Via Air Mail

American Can Company, New York City, N. Y.

Attention: Mr. L. D. Jenkins

DEAR LEN:

Kindly let me have a word from you on the attached clipping. Where there is smoke there is fire, undoubtedly and we certainly can use a lower can cost today, to say nothing of substantial rebates which we feel you must be saving up for us for a birthday present.

Yours sincerely, Bruce's Juices, Inc.

Dict. 4/5/40.

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DEFENDANT'S EXHIBIT F-4

American Can Company
230 Park Ave.
N. Y. C.

April 11, 1940.

L. D. Jenkins, Asst. to Gen. Mgr. of Sales.

[fol. 529] Via Air Mail.

Mr. J. Adams Bruce, President, Bruce's Juices, Inc.,
Tampa, Florida.

DEAR ADAMS:

Answering yours of the 6th to which you attached clipping from the "Times" of April 4. This information is news to us and we have no idea of the source of such information.

As we discussed during your recent visit, there has been considerable reduction in this can price over a period of time and naturally we have given some consideration to your discussion in this office. If and when it is possible to make any further reduction in

this small juice can, you may rest assured that it will be promptly passed along.

Very truly yours, Len.

Mr. Fowler:

Q. Then what was your next contact with the American Can Co. on this question—Mr. Bruce?

A. About this time.

Q. What time?

A. April 11, 1940 or shortly thereafter. It was brought to my attention in various ways, one of which was through the information given me by my manager in Texas, that the Continental Can had discovered that the American Can had been giving a secret low price for quite sometime to Engleman Gardens for the production of their "One-Up".

Mr. Allison: That is objected to because it is not shown it was made in the presence of the American Can Co.:

It is immaterial, irrelevant and incompetent: it is remote to the issues, as to what any employe of the Bruce's Juices might have said at any time; and it is hearsay evidence. [fol. 530] Witness: I might add that Mr. Nugent, the General Manager of Sales of American Can Company has offered in evidence that on the 28th of September, 1939, they did make a price on the 312 cans to Engleman Gardens.

Mr. Allison: We renew the motion. It appears that the Defendant ceased the use of the can upon which any price might have been quoted, and it therefore is immaterial and irrelevant unless it is shown that this witness attempted to place an order for the same can which he describes was sold to Texas as the states price.

The Court: I reserve the ruling on it.

End of that Witness for the Present

Thereupon the Defendant further to maintain the issues on its behalf, then and there recall the witness, Harold Davidson, who testified as follows:

Direct examination.

Mr. Fowler:

Q. Stopping the testimony of Mr. Bruce a moment, they have produced from the office of Bruce's Juices the form of Contract, which is in letter form, or rather a copy of it,

which both Mr. Bruce and Mr. Davidson are willing to testify is a copy of it, and the original agreement between the parties for the handling of the juice in that territory.

Mr. Allison: I want that to come up together with the correspondence. He said that there were several letters exchanged between the parties.

Mr. Fowler: We now produce at the request of the Attorneys for the Plaintiff, a contract between Mr. Harold [fol. 531] Davidson, Louisiana News Company, dated January 30, 1940, and supplemented by a letter between the same parties dated May 2nd, 1940, which we are glad to offer in evidence, if Counsel wants them offered in evidence. They were produced at the request of Counsel.

Mr. Allison: I do not think it is material or relevant one way or the other.

Mr. Fowler: Then there is no need to encumber the record. We now produce copy of letter from Bruce's Juices to Mr. Davidson dated April 26, 1940 which was in answer to the letter from Mr. Davidson referred to this morning, it being dated April 23, 1940.

Mr. Bruce: That is the letter that is the answer.

Mr. Allison: Mr. Davidson testified that there was more than one letter regarding the complaint.

Mr. Fowler: I know he did, but we have not found any more complaints. Here is one other letter that we have located dated Dec. 4, 1941 and we would like to know if they are going to use that in evidence. There is no use of us doing a lot of work if they go on a fishing expedition. If they are not going to introduce that we are not going to produce any more from Davidson to Bruce's Juices.

Mr. Allison: Is there any reply to that?

Mr. Fowler: While we are waiting let us introduce these other two in evidence, the letter of Mr. Harold Davidson to Mr. Bruce, Bruce's Juices, dated April 23, 1940 and ask that it be marked Defendant's Exhibit F-5, and we will produce a copy of it.

[fol. 532] DEFENDANT'S EXHIBIT F-5

Louisiana News Company

1028 Carondelet St.

New Orleans, La.

April 30, 1940.

Mr. H. E. Bruce, Bruce's Juices, Tampa, Florida.

DEAR MR. BRUCE:

With the warm weather coming on and more outlets opening to handle Bruce's Juice, we are laying plans for a tremendous increase in the sale of your juices in the future.

However, there is a condition here with which you are no doubt familiar as it must exist in other sections of the country and you can offer suggestions as to how to combat it.

This is brought on by the fact that Won Up and Bestex Grapefruit Juice is being offered to the dealers at 40 cents per dozen cans against our 42½ cents. Their salesmen have been using this price as a whip which has reflected in our sales on Grapefruit Juice and has lost some of our dealers. Our salesmen say that the new accounts they are trying to put on, complain only about our price on the Grapefruit Juice saying, if we quote them 40 cents per dozen on Grapefruit Juice they would be glad to handle our other Juices at the regular prices.

We have been as you know talking our quality also the ¼ ounce more in contents over our competition, but this seems to have no effect on the dealers, it being mainly a matter of price with them.

We certainly would appreciate a suggestion from you as to how we can overcome this price difference as we are all enthused about the possibilities of your product and with our contacts assure you that we intend to go out and show you a real job of selling Bruce's Juices, hoping in the meantime that the price on Grapefruit Juice can be adjusted.

Very truly yours, (Signed) Harold Davidson.

And the answer of Bruce's Juices to that letter, dated April 26, 1940 as Defendant's Exhibit F-6, which exhibit is in words and figures as follows:

[fol. 533] DEFENDANT'S EXHIBIT F-6

April 26, 1940.

Via Air Mail

Louisiana News Company, 1028 Carondelet St., New Orleans, La.

Attention: Mr. Harold Davidson

GENTLEMEN:

We are much encouraged to have your letter of April 23.

With reference to the competitive situation, remember that you have four Juices to offer to your trade. This is three more than any of your competitors have. We urge you to concentrate your efforts on Orange Juice, Blended Juice and Tomato Juice and you can just watch those orders roll in for Grapefruit Juice.

We know that the quality of the Juices that you are offering, particularly Grapefruit Juice, is unsurpassed by anyone else offering a similar type can. All you have to do is to cut the Juices to prove that.

The important thing to remember is that you are selling Bruce's Juices and not any particular kind of juice.

With the ambitious program you have in prospect, we look forward to having your order for another carload in the near future. We want to co-operate with you as closely as we can in everything you are doing, so don't hesitate to let us know what your problems are and we will see what we can do to help you with them.

Yours very truly, Bruce's Juices, Inc.

Mr. Allen: For identification, the letter which was not filed in evidence from Mr. Davidson to Bruce's Juices, was dated Dec. 4, 1941.

[fol. 534] Mr. Fowler: I made a statement that was not correct just before we stopped. I said that we had ordered juice cans in January 1940 as I recall it. Actually we or-

dered the 312 can I referred to through January 1939 and ordered the 314 and other sizes of cans since that time.

The secret price that we contend that was made to Engleman Gardens, according to the testimony of Mr. Nugent, I believe and Mr. Howry, I definitely remember as of Sept. 28, 1939.

The records show, which are now before the Court, that they sold no one else the little can at this price until the Border Packing Co. in 1940 and to Libby-McNeil & Libby in August, 1941, and Morgan Packing Co. in August or September, 1940.

Now, Mr. Allison's argument about comparing our purchase of the 314 can and the five gallon can is not logical because there are the two sized cans that are in question, and I take it that it is testified that they are the same grade and quality, and they are known in the retail trade, as the six ounce can:

And further, that Mr. Bruce will testify that he tried to buy the 312 can and it was made impossible for him.

And further, that he was buying the 314 can and if he could have bought the 312 can he would have bought it and used both in their operations.

And I submit to the Court that these objections, on matters of this nature, that the Court should reserve the ruling on them until the end of the hearing and decide the merits of the whole case.

The Court: I will let him go ahead and testify and reserve the ruling.

Thereupon the Defendant further to maintain the issues on his behalf then and there recalled the witness, J. Adams Bruce, who further testified as follows:

[fol. 535] (Thereupon the last question and answer was read to the witness, heretofore made by him.)

Witness: And since I was competing directly in many markets with "One-Up" and since the two cans which we were using were of the same grade and quality and were in competition with each other, and both sold by the retailer at the same price to the consumer, I realized that in my situation I had to do something about it. My word had been given and the word of Bruce's Juices had been given to distributors in good faith, and they had established their distributorships and they had made investments of their

own and we had made substantial investments in the distribution, production and advertisement of the individual service cans, and we were buying those cans from the American Can Co. and they were turning around and secretly selling the can, which was substantially the same can, at a lower price to the competitors, and the competitors that they were selling to were coming into the market that our distributors had developed and they were coming in and taking business away from us. And so I had to do something about it.

And so I went to New York, and on April 18 or 19th, I met with the head of the Sales Department of the American Can Co. in their office in New York, and I laid out before them the whole scheme of distribution, of the individual service. To do it properly I made out, before I went in to see them, fourteen different points dealing with what the consumer had to do with individual service and what the retailer and distributor had to do with it; Whether the jobber distribution was satisfactory or not; whether the canners angle was satisfactory or not; whether the canner who had established a distribution and who had the responsibility of continuously supplying it to the distributor, advertising it to be developed, and carrying on; and there was a consider-[fol. 536] able investment on our part to see that there was sufficient merchandize so that we would continuously supply these distributors that we took on; and went into the phase of where the Can Co.'s were going with their methods of selling the can that we were putting a lot of advertising on, and secretly selling a competitor the can of practically the same size; a quarter of an ounce difference, and on a differential away below the price of the can they were selling and away lower than they had sold us the same can when we were buying it, and let these people go in there and take the busjness away from us. They were trying to make two profits, I told them, first trying to have us develop the distribution with selling us a can and going over our backs and having the Texas canners develop a juice and having them to take the business off our hands with a can at a lower price and then give a big discount, and all of that time I pointed out to them that we had been begging and asking them for a lower price, and how could we cooperate with them to get that lower price, and they said we don't know, if there is any way that we could ever get your price down, we certainly would work with you.

I knocked them cold. I had them cold. They were discovered. Their secret price had been——

Mr. Allison: I move to strike the statement of the witness, the entire argumentative statement.

The Witness: I am recording another conversation between Mr. Nugent and myself in New York.

Mr. Allison: Because it is not based on ultimate facts. What he might have done or the competitor might have done to them without stating what the facts are, is a conclusion.

If the statement made by the witness is made solely for [fol. 537] recounting the conversation that he had with the Plaintiff's officials, then it is immaterial, irrelevant and incompetent. If it is made for the purpose of setting forth the facts, it is argumentative and contains conclusions and not ultimate facts except that there was a conversation.

The Court; I think that if Mr. Bruce wants to state what it was sold for and what his price was and what the secret price was, it is material, but I do not think the general statements that have been made have very much weight one way or the other. All we are concerned with are the facts. If he wants to tell the price that they sold it for out there and the price that he paid for his here, all those are material facts, but we haven't got any of those facts here. He said something about that he had them cold.

Mr. Fowler:

Q. Who did you meet with Mr. Adams?

A. Mr. Nugent, and Mr. Jenkins, the head of the Sales Department of the American Can Co. in their office in New York.

Q. On what street?

A. 230 Park Ave., New York City.

Q. In what year?

A. 1940.

Q. Now continue and state what you said and what was said to you during this conversation.

(The question was not answered. At this point adjournment was held until 10 o'clock A. M. October 7, 1943 at which time the hearing was reconvened and the following proceedings were held and testimony taken:)

Thereupon the *the* 7th day October, 1943 at ten A. M. o'clock the Defendant to further maintain the issues on its

behalf, did then recall the witness, J. Adams Bruce, who further testified as follows:

[fol. 538] Mr. Allison: If the Court please, before we go into the presenting of the testimony, there was one point came up yesterday and I think we can clear it up right now.

Mr. Fowler raised objection to the admission of these notes because they had no documentary stamps attached thereto.

Section 20109 of the Florida Statutes 1941 which is identical with Section 1279 of 1940 Supplement, which in turn reads as follows: (Counsel reading the Statute:)

I have here for examination if Counsel desires, each of the notes, attached to the original note, bearing documentary stamps, and in the record of the testimony taken July 22, 1943, on page 12, Mr. Snyder upon examination by Mr. Fowler, traced this indebtedness in each instance back into the original notes, all of which have stamps.

The Court: I should think that under those circumstances that the new notes would require no stamps.

Mr. Allison: That, I understood, was the only objection made by the Defendant to the introduction of the note. Is that correct, Mr. Fowler?

Mr. Fowler: That is the only objection made.

Mr. Allison: If you care to examine these notes at any time I have them here.

The Court: All right, we will proceed.

Mr. Fowler:

Direct examination continued:

(The last question was read to the Witness.)

Mr. Fowler: I am just going to pause here to say to you [fol. 539] gentlemen of Counsel over there that we have some exhibits that were marked for identification in New York and offered in evidence, to which we objects and that have not been passed on yet.

Mr. Allison: That is correct. I believe it was Exhibits 2 to 14.

Mr. Fowler: I don't remember exactly but I just wanted to mention it, there is so much of this stuff to keep in our minds, just in fairness I wanted to mention it to you.

Mr. Allison: I checked the record and my best recollection is that the various letters were admitted without objec-

tion, Nos. Exhibits 2 to 14, dealing with the expenses incident to the quantity discount scale, were offered in evidence and objected to.

Mr. Fowler: Yes, sir, I believe that there was one or two letters that we objected to because we found no copies, and if we found them we were to withdraw the objection. It may be we will now. We will get into that.

Mr. Fowler:

Q. Mr. Bruce, yesterday you identified the letters that Mr. Davidson had written you, you were in the midst of relating the substance of a conversation had in New York City in the office of the American Can Co. on the 18th or 19th, where I believe you said the Sales Department of the American Can Co. and I believe you stated you had told them your situation regarding the development of the little can, and that you had been trying to reduce the price, etc., and that you had found out about this price and asked them to do something about it. I don't remember the rest of it. Now can you take up from there and repeat the conversation? Or, do you wish what you said read to you?

[fol. 540] A. I think I can pick up and carry on.

Q. All right. You understand you are allowed to state the substance of what you said and what other people said without any conclusions unless they were orally expressed there.

A. I pointed out to the Can Co. Officials that when I bought the 312 can I had paid a certain price for it, and then in the same month when I bought the 314 I had paid 18¢ higher for it.

May I ask a question for clarification? The Judge said yesterday that I had not given any price?

Q. That is right.

A. In that conversation I did not discuss prices at that time, but I would like to put that in now, if it would be clear, but it would not be part of my conversation.

The price that I had bought the 312 in January was $12.46 and the price that I paid for the 314 in January was $12.64, which is 18¢ higher.

Q. That included your lithographing and lacquer.

A. Yes sir, that is correct, and both of those charges were f. o. b. Baltimore, carload water rate freight equalized with Tampa, Fla. I would like to repeat that that was on both the 312 and 314 cans.

Q. What was the difference between the lithographing and lacquer charges between the two cans?

A. Practically nothing.

Q. The same.

A. Yes sir, a nickel, maybe.

Q. You can get that exact or can you not?

A. It is in the files.

Q. We will get that later, then. In other words the 312 and 314 were handled exactly the same in January 1939 as far as the allowance of freight was concerned in Tampa.

[fol. 541] A. Yes sir.

Q. Were they handled identically the same way?

A. Identically the same way, carload lots, and water rate freight was equalized with Tampa, Fla. on both the 312 and the 314 cans.

Q. Now, continue with your conversation.

A. In my conversation with them, with the Can Co. officials, or Nugent and Jenkins, on April 18, 1940 they told me that the price they were charging Engleman Garden on the plain tin portion of the 312 can was $9.68; and I pointed out to them that the price that we were paying for the plain tin portion of the 314 can was $10.14, which is a difference, I told them, of 46¢ per thousand. I told them I wanted that difference reduced to 18¢ which was the same difference that I had been granted on the two cans when I had purchased those two cans in the same month.

To make the balance of the conversation clear, I would like to refer to some letters which are already in evidence, a letter of April 8, 1940.

Q. Is it in evidence?

A. Yes sir, put in evidence in July.

Q. What was the date of it?

A. April 8, 1940, written by Mr. J. E. Sarver, General Credit Manager American Can Co. to me.

Q. It is Plaintiff's exhibit No. 21?

A. Dear Mr. Bruce: (Thereupon the witness read the letter to the Court:

And the two notes were attached to that, one for Seven Thousand odd, and one for One Hundred and Two thousand odd, renewals were for sixty days. I did not sign and return those renewal notes at that time because I had discovered or become aware of the secret price granted, and [fol. 542] at these conferences I discussed these notes, and I told the American Can Co. officials—I am back in the con-

versation I just stepped out of—and in the conversation of April 18-19 I told the American Can officials that I was not going to sign the renewal notes, that I wanted an adjustment on the damage that had been done me and the damage that had been done to my distribution. They told me that these things were entirely outside of their control. They said that they were impressed with what I had told them. They said that they thought that there was justice to my claims and that they would take the matter up with their superiors who passed on these matters. During that same day the matter was also discussed with Mr. Sarver, who is the General Credit Manager and who had written me the letter on April 8th, and they said if our recommendations are accepted, will you be agreeable to renewing these notes so that they can be kept current till such time an adjustment is arrived at, and then, when that adjustment is arrived at, it will be applied on the notes. I told them that would be agreeable but I was not taking any reduction such as had been previous- agreed and was referred to in the letter of April 8th but I would renew the notes in the amounts that they were prior to their maturity of April 15 and that instead of sixty days notes for convenience they would be ninety day notes.

And, after we had discussed the matter of these little can discriminations, I also pointed out to them two other matters, one of which I had taken up with them previously, and that is some form of discount on the quantity of cans that I was buying.

The second was the fact that we were drawing our cans here in Tampa from the local Can factory in our own truck [fol. 543]. at our own expense, whereas Del Monte and Stokeley also located in Tampa, were taking their cans in rail cars and the American Can Co. was paying the freight of switching charge from the Can factory to the Cannery of the California Packing Co. and Stokeley Bros. I touched on that time only in a general way.

After these three matters had been discussed, the secret price on the 312 can, the quantity discount and the freight, we went into an entirely different matter which was that I wanted to pack additional merchandise and an arrangement was agreed on that day between myself and the officials of the American Can Co. with whom I was talking, that the small secured credit of approximately $7700.00 which we had would be increased to $50,000.00 secured line

of credit, and in order to make the adjustments so that it would come out even, for every $6,000.00 secured, which they gave us we would pay off a $1,000.00 of the unsecured, so that in effect we would receive actually $42,000.00 secured and adjust the whole structure of secured and unsecured by paying off $6,000.00 of the unsecured.

And one other point was taken up which was that we would buy our cans on open account on the understanding that the invoices were to be liquidated each week and the total amount unpaid in such shipments should not amount to more than $10,000.00: that is, if we took more than $10,000.00 worth of cans in one week, we would have to pay cash that week instead of taking it on an open billing to pay the following week.

That is the way that situation was left that day.

Q. Mr. Bruce, how long would you say you were in the offices of the American Can Company that day?

A. Several hours.

Q. Were you in conference most of that time?

A. Yes sir.

Q. I will ask you whether or not anything was said about paying interest on these renewals, on these notes, or re-
[fol. 544] newals of the notes that you mentioned.

A. Oh, yes, the situation on the notes was that instead of reducing the notes $4800.00 and renewing every sixty days, that no reduction would be made on the notes except that which was subsequently agreed to in that same conference, but insofar as the renewal which had been sent to us, no reduction would be made and the renewals would be made at ninety days intervals just to keep them current so that the situation would remain as it was prior to April 15 and would not change until the adjustment had been made which I demanded.

Q. What was said about interest, if anything?

A. Interest would be paid on the notes so that they would remain to all intents and purposes for convenience in bookkeeping and so on, that they would remain in order until adjustment was made, and then all that would be taken into consideration at the time the adjustment was made.

Q. When were the notes to be paid and when were the adjustments to be made? Was that discussed?

A. There was no final date set as to when the adjustments were to be made. The people with whom I was talking had

not the power to pass on this. They could only recommend this.

Q. When were the notes to be paid?

A. The notes were to be renewed until an adjustment was made. I had told them that unless an adjustment was made as far as I was concerned, that the notes would not be paid and that was agreeable to them.

Q. Was that so stated?

A. Yes sir.

Mr. Allison:

Q. By whom? Which of the officials stated that that was agreeable?

Mr. Fowler:

Q. Who stated that that was agreeable?

[fol. 545] A. Mr. Nugent was the moving spirit that dominated.

Q. Do you know who actually made the statement, whether Nugent or Sarver or Jenkins?

A. I know that Jenkins did not make the statement. I am certain that Sarver did not. All of my discussions were with Nugent.

Q. You- conference was with Mr. Nugent?

A. Yes sir, it is possible that Mr. Sarver may have repeated it.

Q. Did you receive any further letter in connection with this? Confgrence following this conference?

A. Yes sir—on April 22, 1940 I received a letter which had been entered in evidence as Plaintiff's Exhibit No. 22, signed by J. E. Sarver (Thereupon this letter was read to the Court).

(Signed by J. E. Sarver, General Credit Manager)

Q. Since that time Mr. Bruce, except in line with that letter, have you been called upon by the American Can Co. prior to the time they demanded payment of the entire note in 1942, to make any reduction on the principal at all?

A. No sir. But in that connection I would like to explain that in two years, 1940 and 1941, we, Bruce's Juices, were given a so-called voluntary two per cent rebate on their gross purchases. That was given to every single customer of the American Can Co. so they tell me. In one of those years we asked them to apply that voluntary rebate to the

unsecured notes, simply reducing the interest. That is the only reduction that has been made. And at no time were we asked by the American Can Co. to reduce our unsecured notes.

Q. What next transaction did you have with the American Can Co. or its representatives regarding the matters to which you have testified?

[fol. 546] A. It has been the custom of the American Can Co. to visit me in Florida in the Fall just prior to the opening of our citrus season, or shortly after it is open, to discuss our relations and insofar as credit relations are concerned, an official of the Credit Department, Mr. A. W. Geier called on me in October 1940.

Q. You had other contacts which we will go back to but you are talking about the financial now?

A. Yes, sir, I am talking about the financial now. But there are other things that happened between April and October that I will discuss later. In October 1940 Mr. Geier, accompanied by Mr. Slayton——

Q. Who is Mr. Geier?

A. General Credit Manager, accompanied by Mr. Slayton, Local Sales Manager, and we discussed the credit relationship.

Q. Where did you see them?

A. In my office in Bruce's Juices Plant in Tampa.

Q. Continue.

A. We discussed various phases of credit. I told them that I would like to have an additional credit of $10,000.00 in cans at the start of the season. Mr. Geier said that he had no authority to grant such an extension, but he would take it up with his superiors and let me know. He asked me if it was agreeable to continue renewing the unsecured notes on the basis we had been, and I told him yes, except that I reserved my right to protest. And I also told them —told him that while carrying those notes in a current condition, for the American Co. might be a satisfactory thing, that it was too cumbersome for me and that I wanted for my convenience to have substantial portion of the unsecured notes deferred for the period of more than one year so that it would not appear as a current item on our [fol. 547] books. He asked me how much I wanted and I told him that $75,000.00 would be a satisfactory amount. He said he would take the matter up with his superiors. I told him to take it up and get it agreed on and just notify

our Auditors who at that time were making up our annual statement.

Again in the Fall of 1941, Mr. Geier accompanied by Mr. Slayton, visited me at my office in Bruce's Juices Plant, in Tampa, Fla. and we discussed our credit relations for the ensuing year. I told them that at the immediate start of the season I would like an extension for cans of $5,000.00 and he said he would take that up with his superiors and let me know. I told him that the note for $75,000.00 which was due on about fifteen days would have to be renewed for another twelve months period, that is for twelve months, so that it could be again shown on our balance sheet as a deferred item. He said that he would take that up with his superiors. I told him that I reserved the right to protest the amount of the indebtedness and that, subject to the protest, I was willing to continue the renewal of the notes.

And, in March 1942, I visited Mr. Geier in his office in New York, and told him that I considered the present, March 1942, a very sound one in which to arrive at the adjustment, and I went into a great deal of detail to explain to him why March 1942 was a satisfactory time.

I also explained to him how an adjustment made at that time would be much more satisfactory and beneficial to us, that is to Bruce's Juices, and much more beneficial to the American Can Co. than if delayed to a later date. That conversation lasted for quite some time and in it I told Mr. Geier that while I had not figured out the extent of the damage——

[fol. 548] Mr Allison: Just a moment, Mr. Bruce—was this in connection with endeavoring to compromise this claim?

A. Yes sir.

Mr. Allison: If the Court please, we are placed in this position. In the testimony taken in New York, this conversation was——

The Court: If there is no objection to his testimony, let him go ahead.

Mr. Fowler: I want some matters cleared up here. They brought out over my objection this conversation, and it is in there——

The Court: They are not objecting.

Mr. Fowler: I know they are not, but if our objection to their testimony is sustained, this should go out too and so

I want to put that in with that understanding, if the Court please.

Mr. Allison: I would like to comment on one very material point there, that we do not contend that this was an effort to compromise. It is up to the Court to decide whether it was or not. It is not our position that it was an effort to compromise. Mr. Fowler's position is that it was and I think that should be determined before the admissibility of this should be put in.

The Court: If he makes no objection to the testimony, any testimony as to the compromise can be put in.

Mr. Fowler: Therefore, with the Court's permission, and with the understanding that this conversation which includes what the Defendant contends was an offer to com- [fol. 549] promise, it may be placed in the record in view of the fact that the testimony regarding same according to the interpretation of the Plaintiff is already in the record, to which the Defendant at that time objected. If our objection is sustained or if the Court should ultimately decide that this has any connection with a compromise we may at that time, if the Court thinks it is proper, withdraw it or have it stricken by the Court.

The Court: All right, go ahead.

Mr. Fowler: Go ahead, Mr. Bruce.

(Thereupon the last statement was read to the witness.)

Mr. Allison: If the Court please, I think the only comment I can make there is that that statement of Mr. Fowler is that should be under some contingency desire to withdraw this present testimony to be offered, that is a question to be passed on at that time.

Mr. Fowler: I wanted to reserve my position which I think I am entitled to.

Mr. Allison: That is all right. Of course we are not agreeing.

(Thereupon the last part of the answer was read to the witness.)

Witness: I thought that $50,000.00 would be a fair figure to both and he asked me what proposal I would make with the balance. I told him I did not think it would be in the interest of either of us that the balance should be a burden but that definitely it should be taken care of on some basis provided the $50,000.00 adjustment was agreed

to, and I suggested that a minimum would be paid which would represent 10% or there-abouts of the remainder, but that it would set-up on some basis where it would be [fol. 550] reduced more quickly than a ten-year period, if it seemed in the interest of both parties. He said that it was usual when adjustments were made, that the balance be paid in cash. I told him if possible that might be worked out; I did not have any plans on it at that time, and so that's the finish of the conversatio-. He said I will take it up with my superiors and the next time you are in town drop in and see me. He said that it sounded very sensible to him.

So in the early part of 1942 I again called on Mr. Geier in his office in New York, and there was present besides Mr. Guyer, Mr. Jenkins of the American Can Co., and Mr. Howry of the American Can Co.

Q. Who is Mr. Howry?

A. He is one of the officials in the Sales Department, Packers Cans, American Can Co. His exact title I don't know, but it is in the record. A number of things were discussed none of which had anything to do with the purpose of the conference, so after sitting there for sometime, I put up the subject that I had gone there to discuss with Mr. Geier, namely the adjustment, and Mr. Geier said in substance—"Oh, if it is with regard to that, I took it up with the officials of the Can Co. and they said we cannot make any adjustments with Bruce's Juices while they are making money now. If it will be any help to them we will take $100,000.00 of their indebtedness and set it up with interest for five years, and we will look at the picture then and see what the situation is." And I asked those gentlemen if they knew that an agreement existed between the American Can Co. and Bruce's Juices whereby an adjustment was due Bruce's Juices and they said no and I said you had better go to the people who made that agreement [fol. 551] and find out what it is all about, you don't know what you are talking about here and I said you get busy and find out what the true situation is between the American Can Co. and Bruce's Juices and then come and talk to me. And I said "If you think I am going to live out my life in bondage to the American Can Co., you are crazy," and left them.

With regard to that conversation I would like to point out that before leaving, as I have stated, I expressed again

to them the same points that I had mentioned in the March conference with Mr. Geier trying to make them see the sensibleness of my position and the unreasonableness and unsoundness of theirs.

I did not hear further from any officials of the American Can Co. with regard to our unsecured indebtedness until I received a letter which has not been placed in evidence, I don't think—has it? I don't know. Let's see it and see what it is.

A. The letter is dated May 18, 1942.

Q. Mr. Bruce, did you receive this letter in due course of mail, and is the signature that of Mr. J. E. Sarver, General Credit Manager of the American Can Co.?

A. Yes sir.

Mr. Fowler:

Q. I now offer in evidence the letter of May 18, 1942 and ask that it be marked Defendant's exhibit F-7.

Mr. Allison: To which the Plaintiff objects upon the ground that it is immaterial and irrelevant to the issues in this cause.

The Court: Let it go in. Objection over-ruled.

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[fol. 552] DEFENDANT'S EXHIBIT F-7

American Can Company

New York Central Building, 230 Park Ave., New York

J. E. Sarver, General Credit Manager
A. W. Geier, Asst. General Credit Manager

May 18th, 1942.

Bruce's Juices, Inc., Tampa, Florida.

Attention: Mr. J. Adams Bruce, President

DEAR MR. BRUCE:

We are holding the following notes, the principal of which will become due on May 25th, along with accrued interest to that date:

| Date of Note | Payee | Maturity Date | Amount | Accrued Interest |
|---|---|---|---|---|
| Feb. 23, 1942 | American Can Co. | May 25, 1942 | $19,799 97 | $250 25 |
| Feb. 23, 1943 | American Can Co. So. | May 25, 1942 | 7,039 25 | 88 96 |

In addition to the above items, there will also be due on May 31, 1942 accrued interest of $958.33 covering interest from February 28, 1942 to May 31, 1942 on your note dated December 31, 1941 for $75,000.00.

When you were in New York a short time ago we endeavored to work out with you a satisfactory plan for the liquidating of this indebtedness over a period of years. Our suggested plan did not meet with your approval, and neither was the plan suggested by you agreeable to us. We are not agreeable to letting this account run along on its present basis indefinitely and feel that some plan for the liquidation of this indebtedness should be worked out without further delay, and unless some such plan can be agreed upon by the time the above two items become due, then we will expect them to be paid at their maturities dates, and will also expect the balance of your notes which we are holding to be paid when they mature.

Would be pleased to have you advise us promptly whether or not you desire to meet with us in an endeavor to work out some kind of a satisfactory plan for the payment of this indebtedness, or whether you will arrange to meet these obligations as they become due.

Very truly yours, American Can Company, (Signed) J. E. Sarver, General Credit Manager.

[fol. 553] Mr. Fowler: We will submit the copy in accordance with our agreement.

Mr. Fowler: If the Court please we now offer in evidence to which counsel said, I believe, they will not object because it is a copy of a duplicate letter of May 21, 1942 to the American Can Co. signed Bruce's Juices by President. and I now offer this letter, or a copy of letter, in evidence which is a letter being in response to and regarding to the same matter as the exhibit just introduced in evidence and ask that it be marked Defendant's Exhibit F-8.

Mr. Allison: To which Plaintiff objects on the grounds:

1. The letter is incompetent, immaterial and irrelevant.

2. It is solely and purely a self-serving declaration not shown in any way to be binding upon the Plaintiff; that the issues in this case are the indebtedness involved therein.

3. Any statement made therein by the Defendant not shown to be concurred in by the Plaintiff is inadmissible under the rules of evidence.

The Court: I will over-rule the objection and let it go in.

Whereupon the said exhibit was marked as Defendant's Exhibit F-8, and is in words and figures as follows:

DEFENDANT'S EXHIBIT F-8

May 21, 1942

American Can Company, 230 Park Ave., New York, N. Y.

Attention: Mr. J. E. Sarver

GENTLEMEN:

[fol. 554] Your letter of May 18th has been received, calling our attention to the fact that certain notes were due on May 25th, and demanding payment thereof, as well as referring to the note which you hold that is due in December. It is interesting that although these notes have been held by you for a long time, we are suddenly called upon to pay them in full.

We are quite in agreement with you that something should be done in reference to this situation and the correct amount to which you are entitled should be ascertained, in accordance with my repeated suggestions to your representatives during the last several years.

We all have realized for a long time that these notes did not represent the true amount due and that there were adjustments that should be made and ultimately would have to be worked out. I have consistently reserved my right of protest, as you know. At some convenient time I would be very glad, once and for all, to arrive at a definite settlement and work out some policy regarding the ultimate liquidation of any balance due.

As you know, the writer is very busy in seeking to comply with requests by various branches of the Armed Forces to perfect and supply in large quantities special products which they have found of great importance, and it is felt to be our obligation at the moment to comply with their requests.

Yours very truly, Bruce's Juices, Inc., President,
(Signed) J. Adams Bruce.

Court: ——.

By the Witness: With regard to the two notes mentioned in Mr. Sarver's letter of May 18, 1942, the date of note

Feb. 23, 1942, Payee American Can Co., maturity date May 25, 1942, amount $19,799.97 and accrued interest $250.25, the actual note form was sent to us enclosed with or attached to a letter which already is in evidence.

Q. It is a letter that was read in evidence so in that testimony it can be identified there.

Page 39 of the February 15th testimony.

Q. Mr. Bruce read that letter in evidence and I take it [fol. 555] that he can read it at this time to keep the chronological story before the Court apropos of the situation at this time. Just read the letter as read into the evidence.

Mr. Fowler:

Q. What is the date of that letter?

A. The letter is dated Feb. 12, 1942. The American Can Co.: as follows:

To Bruce's Juices: Your note dated Nov. 24, 1941 for $19,799.97 is due at this office Feb. 23. In accordance with arrangements which have been made between yourself and our Credit Department, this note may be renewed for ninety (90) days, and renewal note form is attached hereto for your signature. And interest on the old note from Nov. 24 to Feb. 23 amounts to $250.25. Will you kindly return the signed renewal note with the interest, to reach us by the due date of the note.

In that same letter of May 18, 1942, there was another note dated Feb. 23, 1942, American Can Co. Southern—maturity date May 25, 1942,—$7,039.25—accrued interest $88.96, and that actual note form had been sent to us by American Can Co. Southern, R. A. Burger, Treasurer, writing a letter and attaching that note to it.

Q. The date?

A. Feb. 12, 1942—the letter read: That note dated Nov. 24, 1941 for $7,039.25 is due at this office Feb. 23. In accordance with arrangements made between yourself and our Credit Department, this note may be renewed for ninety (90) days. Renewal note form is attached for your signature. The interest on the old note amounts to $88.96. Will you kindly return this signed renewal note with the interest, so that the same reaches us by due date of the note.

Yours very truly, American Can Co. Southern, R. A. Burger, Treas.

[fol. 556] With regard to my letter of May 21st which was in reply to theirs of the 18th I never received any answer.

Q. Shortly after that the suit was filed, was it not, Mr. Bruce?

A. Yes sir. Actually I was visited the first part of June by R. M. Roberts, Manager of Sales of American Can Co., Packer cans Department, who, in conversation with me described himself as a messenger boy.

Q. What message did he deliver?

A. He said that the American Can Co. were actually placing the two notes in the hands of an outside attorney for collection. As I recall it, he said he happened in on a meeting held between the General Counsel of the American Can Co., General Manager of Sales Packers Cans, of American Can Co., and the General Credit Manager, American Can Co. and they were going to put this in the hands of an outside attorney.

Q. Following that long conference that you referred to on April 22nd, or the conversation referred to in the letter of April 22nd, the conversation being on April 18th or 19th at which time you had a conversation with Mr. Nugent and Mr. Jenkins and others—now, what was the next conference or contact that you had with Mr. Nugent and with the American Can Co.?

A. At that conversation I think I have already stated that the differential between the two cans had to be reduced. They said that they would consider that matter, consult with their superiors and find out whether it could be done. Time went on and neither was our can reduced or the other can brought up to the level that it had originally been at before the secret price was put into effect.

I was going to pack my tomato juice at Bridgeville, Del. in the plant of H. P. Cannon & Son, on June 5th. On June [fol. 557] 5th Mr. Jenkins wrote me a letter and on June 6th Mr. Slayton wrote me a letter, both of which among many other things, dealt with the subject of what sized cans I was going to pack tomato juice in in Cannon's Plant.

Mr. Allison: If he is going to refer to a letter, I think it should be introduced in evidence.

By Mr. Fowler:

Q. Mr. Bruce, I hand you a letter from the American Can Co. dated June 6, 1940 and ask if you received it through the course of mail?

A. Yes, sir.
Q. Do you know the signature attached to that?
A. M. M. Slayton.
Q. Do you know the signature?
A. Yes, sir.

Mr. Fowler: I now offer the letter in evidence.
Mr. Bruce: No sir, I do not know that that is his signature.

Q. Did you receive it through the due course of mail?
A. Yes sir.

Mr. Fowler: I ask that this be marked Defendant's Exhibit F-9.
Mr. Allison: To which the Plaintiff objects for the reason that:

1. The same is incompetent, irrelevant and immaterial.

2. The exhibit shows upon its face that it has no relation whatsoever to the issues in the cause, or the consideration—for the notes herein sued on.

The Court: What is in the letter?

(Thereupon the letter was read to the Court)

[fol. 558] Mr. Fowler: I will state to the Court the purpose of it as leading up to our statement that we sought to buy the 312 can, and this refers to the 300 can which we purchased, but it is a part of that whole program.
The Court: Are any of these cans involved in this case?
Mr. Fowler: Yes sir.
Mr. Allison: I don't understand how they are involved.
Mr. Fowler: The comparison of the prices are involved, and in addition to that, it shows that we were still waiting to decide what sized can we would use, which was dependent upon the adjustment of price which we had asked for in this other conference, and it ties in with the development that happened in June when we started to buy the 312 can and we were compelled to use the can that would be the least discriminatory and to the best of our interests.
Mr. Allison: It appears that the Defendant is now seeking to impeach his own testimony in this case heretofore brought out, that the Defendant had changed over exclu-

sively to the 314 can in January 1939 and any other sizes are not involved in the issues of these two causes.

Mr. Fowler: That is true. We did change over but having changed over, we were compelled to try to change back on account of the discriminatory price. And when we tried to change back, the evidence will show that we were not permitted to do it, and they said because we did not buy it we were not entitled to it. Another thing, Mr. Allison has evidently forgotten the first paragraph of this letter when he said it only referred to the 202 x 300 can— [fol. 559] which I will read again, the first and last paragraphs—and we were trying to figure out what can we should use to the best advantage because of this discrimination.

Mr. Allison: Quoted price is not a discrimination under the Robinson-Patman Act. It has to be a discrimination in price on sales. And furthermore I do not think Counsel will contend that all of the decisions do not hold that you can sell to whom you please without violating the Robinson-Patman Act, and therefore letters passing back and forth, or conversations relating to what price you will charge are wholly immaterial and irrelevant in this cause.

(Thereupon the letter was marked Defendant's Exhibit F-9 and is in words and figures as follows:

DEFENDANT'S EXHIBIT F-9.

American Can Company
1st Avenue & 22nd Street
Tampa, Florida

M. M. Slayton,
Local Sales Manager
June 6, 1940

Bruce's Juices, Inc., Tampa, Florida.

GENTLEMEN:

Attention of Mr. J. Adams Bruce

This letter will serve as a reminder that you have not yet given us information as to the size or rather the height of the 202 diameter can which you expect to use for tomato juice.

As you know, the printing plates we now have for the 202 x 300 size are still for the 2-color job and as there have to be some changes made in the design when coming from the 2-color job for the 1-color job, it will be necessary to make up new printing plates if you decide to use the 202 x 300 1-color can.

We will appreciate your advising us as soon as possible [fol. 560] what height can you intend to use for tomato juice.

Yours very truly, (Signed) M. M. Slayton, Local Sales Manager.

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By Mr. Fowler:

Q. Mr. Bruce, did you write to the American Can Co. on June 8, 1940?

A. Yes sir.

Q. Was that in answer to any request for information from the American Can Co.?

A. Yes sir.

Q. What information did they request?

A. They wanted to know the size of can I was going to use in packing individual service tomato juice at the H. T. Cannon Plant at Bridgeville, Del.

Mr. Fowler: I now ask that the copy of the letter be marked Defendant's Exhibit F-10.

Mr. Allison: To which offer the Plaintiff objects on the grounds enumerated to the previous exhibit and:

The further ground that we reserve the right to make further objections as to the predicate for the introduction, if we fail to locate the original letter, the same objections we made in New York.

The Court: Objection over-ruled.

(Thereupon the letter was read to the Court and is in words and figures as follows:

[fol. 561] DEFENDANT'S EXHIBIT F-10

June 8, 1940.

Mr. L. D. Jenkins, American Can Company, 230 Park Ave., New York City.

DEAR LEN:

Referring to your letters of the 5th and 6th regarding size of can for Tomato Juice, please understand that we are now awaiting information from you on those matters we expect to be informed on before determining the size of can we are using for Tomato Juice this year.

I believe that this matter should be carried on with all possible vigor and suggest that you get the information to us as quickly as possible.

Yours very truly, ——.

JAB:ml.

P. S. I just note that the letter of the 6th was not from you, but from "Slate", who is with you now.

J. A. B.

Thereupon adjournment was had until 2 o'clock P. M. October 7th, 1943, at which time the Hearing was re-convened and the following proceedings called:

Thereupon the Defendant, further to maintain issues on its behalf then and there recalled the Witness, J. *Adams* BRUCE, who further testified as follows:

Redirect examination continued.

Mr. Fowler:

Q. Mr. Bruce, I believe you received a letter from the American Can Co. on the 12th or did you write them on the 12th? What was the next correspondence pertinent to this issue here?

A. A letter dated January 12, 1940 from Mr. Len Jenkins.

Q. You received this letter through the course of mail and signed by Mr. Len Jenkins, General Sales Manager of

[fol. 562] American Can Co.?

A. I did.

Mr. Fowler: That is offered in evidence as Defendant's Exhibit F-11.

Mr. Allison: To which the Plaintiff objects on the ground that the letter pro-erred is incompetent, immaterial and irrelevant to the issues in these consolidated cases.

The Court: I over-rule the objection—let it go in.

(Thereupon the letter was read to the Court and is in words and figures as follows:

DEFENDANT'S EXHIBIT F-11

American Can Company, New York Central Building, 230 Park Avenue, New York.

L. D. Jenkins, Ass't to General Manager of Sales.

June 12, 1940.

*Personal.*

Mr. J. Adams Bruce, President, Bruce's Juices, Inc., Tampa, Florida.

DEAR SIR:

Relative to your visit of last week regarding the packing of a so-called "tomato juice drink" in Texas, please be advised that I have investigated this matter thoroughly and while possibly such a product was given some thought, it is apparently completely out of the picture and, as a matter of fact, I have a copy of a proof for a lithographed can to be labeled "tomato juice." This proof indicates that the 202 x 312 (5¾-ounce) can will be used.

At this time we have only one other customer who has specified for the small lithographed tomato juice can and in this instance also the 202 x 312 (5¾-ounce) is involved; however, the customer involved is located [fol. 563] a good distance west of the Mississippi River and certainly should not create any competitive situation so far as your distribution is concerned. Of course it is still somewhat early in the season and it is impossible to tell at this time as to the specifications for the future.

We trust that with the above information in hand, you will be able to tell us your decision as to the size can that you plan to use in Delaware operations.

There is also the question of working out some satisfactory credit arrangement for this Delaware operation on tomato juice, and you will no doubt hear direct from the Credit Department in the next day or so.

Very truly yours, (Signed) L. D. Jenkins, Asst. to General Manager of Sales.

Mr. Fowler: We will present a copy of the letter in accordance with our arrangement.

Q. Mr. Bruce, what happened in connection with this letter following that letter?

A. We were getting to a point where we had to pack tomato juice, and nothing was settled on the prices which were to be charged for the various cans that we might use.

Q. You refer to little cans or large cans?

A. Individual service cans. And so, on or before June 17, 1940, there was a long distance telephone call between Mr. Nugent and Mr. Jenkins on the wire in New York and myself on the wire in Tampa. It was a long long-distance call, that is, as to the time, a lot of time was spent on that particular call.

Q. You mean a long conversation?

A. A long conversation.

Q. What was the substance of the conversation?

A. Mr. Nugent did practically all of the talking from New York, but Mr. Jenkins talked once or twice, and indi- [fol. 564] cated that he was listening, and the subject of the conversation was the price on the individual service cans. I told them that the price of the 312 and 314 had to be adjusted, and Mr. Nugent said that he refused to make any alteration in the price of the 312 or 314 can, and said that he had gotten the price of the 312 down too low and he was not going to make any other changes in the price structure of the individual service can. I told him he could raise the price on the 312 can if he would not lower the price of the 314 and he said he could not and would not do that. I told him it was impossible for me to use the 314 can with the 312, at the low out-of-line price to us and it appeared that I would have to go back to the 312. So, during the conversation I tried to buy the 312 can from him and said I will have to take that at $9.68 Tampa and he said no, we will not make a price of $9.68 Tampa on the 312 cans; we will make the price $9.68 f. o. b. Baltimore and you will have to pay the

freight on the cans from Baltimore to Tampa. I told him that I had been buying from him previously, the 312 can and I had bought it freight equalized with Tampa, and was currently buying the 314 and the price was freight equalized with Tampa, and was buying the 300 and the price was freight equalized with Tampa, and that I must have the 312 with the freight equalized with Tampa. He said he would not do it. I pointed out to him then, that I was in an impossible position because I was considering packing the tomato juice, as he knew, at Bridgeville, Del. where my can would come out of Baltimore. I was also packing tomato juice in Tampa, and also that I could not pack the tomato juice under Bruce's Juices labels in the 312 and 314 at the same time; I had to use one or the other; and it was impossible for me to use one or the other, I told him, because if I chose the 312 it is true that I would have an advantage over the 314 in Baltimore for my operations in Bridgeville, Del. which we had discussed with him previ- [fol. 565] ously, but when I brought the 312 down to Tampa the freight was so much that it would cost me 65¢ a thousand more, making a price on the 312 in Tampa $10.33, and I was then in a bad competitive position in my packing in Tampa because I was paying $10.33 for a 5¾ ounce can and a competitor could pack against me in the six ounce can holding a quarter ounce more and would only pay $10.14 in Tampa for that can, or 19¢ per thousand less for a can holding a quarter of an ounce more; on the other hand, if I used the 314 can, my operations would be all right in Tampa because the 312 could not be used against me, but, for my operations in Baltimore I would be using the 314 paying $10.14 for it and competitors packing in that area could use the 312 and get it at 46¢ a thousand less, that is, for $9.68, which was a discriminatory low price. And at the end of that telephone conversation I did not know where I stood, I told him, and on June 17th I wrote a letter.

Q. Was that after the conversation you have just mentioned?

A. Yes sir.

Mr. Fowler: I ask that this letter be marked Defendant's Exhibit F-12.

Mr. Allison: To which the Plaintiff objects on the grounds that it is incompetent, irrelevant to the issues in this case.

2. It is an attempt to introduce a self-serving declaration contrary to the rules of evidence.

Mr. Fowler: I am not quite ready to offer it yet.

Q. Mr. Bruce, do you recall at this time any more of that conversation with Mr. Nugent and Mr. Jenkins that you have just testified about?

A. Yes sir, as I stated it was a very long conversation. [fol. 566] There are two points in it that I did not mention. When I realized that I could not use the 314 and 312 then I asked or told Mr. Nugent that I wanted the 309, that is the five and a-half ounce can, which I had been buying from them some time previously. That can held five and one-half ounces and he gave me the price on the 309, and that was twelve cents higher than the price on the 312. The price on the 312 holding five and three quarter ounces was $9.68 and he demanded $9.80 for the 309 holding five and one-half ounces. I then pointed out to him that I was in the same impossible position in packing tomato juice using the 309. I also told Mr. Nugent that I must have those quotations in writing and he agreed to give them to me in writing.

Mr. Fowler: We now offer in evidence the exhibit which has been marked Defendant's Exhibit F-12 and which the witness has testified to.

Mr. Allison: To which objection has been made, to which objection I wish to add:

3. The letter is secondary evidence inasmuch as the original has not been accounted for. We have not found it yet. If we do that ground will be withdrawn.

The Court: If they do not have the original, then you will — to give notice, I guess, if they insist upon it.

Mr. Allison: If we find it we will withdraw that.

(Thereupon the said letter Exhibit No. F-12 was read to the Court, being a letter from J. A. B. to Mr. Jenkins and being in words and figures as follows:

[fol. 567] DEFENDANT'S EXHIBIT F-12

June 17, 1940.

Via Air Mail.

Mr. Len D. Jenkins, American Can Company, 230 Park Ave., New York City

DEAR LEN:

Replying to your letter of the 12th, we are awaiting the detailed prices of the various sizes before deciding what size we will pack at the Cannon plant. We must also find out whether we are going to be able to finance it under the new methods which the American Can Company have laid down.

We cannot agree with Mr. Nugent's contention on the 308 & 309 can. We are also at a loss to understand the price structure you have in the juice can on the 300, the 312 and the 314. We have been substantial buyers of both the 300 and the 314 and we are at a loss to understand why the differentials exist when both sizes have plate, specially rolled for them. You show a differential of 46¢ representing 2/16 additional height between the 312 and 314, against only 73¢ for 12/16 difference between the 312 and the 300. At the same time, you are unwilling to sell us the 309 for even the same price as you sell competitors the 312. In fact, you want 12¢ a thousand more for it, even though we are purchasing in ten times the maximum quantity specified.

Time will prove that we are the most constructive, and perhaps the only constructive, unit in this beverage can development and yet it seems that we have to fight, not only for what we get, but also against discrimination of this sort all the time. Again, let me remark that we are only selling tin-plate and we look to you for more co-operation than this price structure seems to indicate.

Yours sincerely, —— ——.

JAB:ml.

Mr. Fowler:

Q. What was the date of that letter?

A. June 15, 1940.

— Fowler: If the Court please we would like next to ask [fol. 568] Mr. Bruce to read into evidence a letter that is

already introduced in evidence of the American Can Co. to Bruce's Juices, dated June 18, 1940, signed M. M. Slayton, L.S.M., by W. T. Taylor.

Mr. Allison: The plaintiff objects to the reading of the exhibit already in evidence on the ground that it unduly extends the hearing and this record.

Mr. Fowler: I will not ask him to read the letter, which does include the price list, but here is the price list which was sent and which is already introduced in evidence by Mr. Taylor and identified by Mr. Taylor.

The Court: I don't see any use in reading that. I cannot carry all that in my mind. When we get ready to argue the case would be the best time to refer to it, and you may read it at that time.

Mr. Fowler:

Q. I hand you a letter, Mr. Bruce, dated June 19, 1940 from the American Can Co. to Bruce's Juices, Inc. and ask you if you received that through the due course of mail.
A. We did.

Please mark the letter Defendant's Exhibit F-13.

There being no objection thereto the said letter was so marked and admitted in evidence and read to the Court, the said letter being signed by American Can Co. by Walter T. Taylor, and is in words and figures as follows:

DEFENDANT'S EXHIBIT F-13

American Can Company, 1st Avenue & 22nd Street, Tampa, Florida

M. M. Slayton, Local Sales Manager

June 19, 1940.

Bruce's Juices, Inc., Tampa, Florida.

[fol. 569] GENTLEMEN:

In accordance with your contract, dated November 6, 1939, No. 1270-A, we are glad to quote you on the following size plain sanitary can for the balance of the calendar year 1940:

202 x 312 (2-3-16" diameter x 3-12/16" high) $9.68 per M, f.o.b., Baltimore, Maryland.

Yours very truly, American Can Company, by (Signed) Walter T. Taylor.

Q. I hand you a letter from American Can Co. dated Nov. 21, 1940 and ask you if you received that through the due course of mail.

A. We did.

Q. Please mark that Defendant's Exhibit F-14 which letter we now offer in evidence having submitted it to Counsel.

Mr. Allison: To which offer of said exhibit the Plaintiff objects on the ground that same is:

1. Incompetent, irrelevant and immaterial.

2. The exhibit purports to refer only to a size of can not shown to be involved in the consideration represented by the notes in litigation.

3. The exhibit purports to refer to a matter not involved in the issues or possible issues of the procedure.

4. It is further objected to as immaterial in that any quotation of price does not constitute a violation of the Robinson-Patman Act.

The Court: Let it go in.

Thereupon the letter was read to the Court and is in words and figures as follows:

DEFENDANT'S EXHIBIT F-14

American Can Company, 1st Avenue & 22nd Street, Tampa, Florida

M. M. Slayton, Local Sales Manager

June 21, 1940.

[fol. 570] Bruce's Juices, Inc., Tampa, Florida

GENTLEMEN:

In accordance with your contract, dated November 6, 1939, No. 1279-A, we are glad to quote you on the

following size plain sanitary can for the balance of the calendar year 1940:

202 x 309 (2-2/16" diameter x 3-9/16" high) $9.80 per M, f.o.b. Baltimore Maryland, freight equalized with Tampa, Florida, on carload water rate of freight.

Yours very truly, American Can Company, by (signed) Walter T. Taylor.

Q. Mr. Bruce, I notice that both of these letters, one dated June 19, 1940 and one dated June 21, 1940 which you have just read, state in accordance with your contact. At that time you did have a contract with the American Can Co. did you not?

A. Yes sir.

Q. Is that the copy of that contract or a photostatic copy?

A. Yes sir it is.

Mr. Fowler: That contract is also in evidence.

Q. I notice on this contract that it specifies certain definite sized cans, that is No. 1, 2-2½—404 x 700 and No. 10. Do you have those cans here?

A. We have four of those five sizes. We only used four of those five sizes. We have not been customers of the American Can Co. since January 1, 1940.

Q. Do you have the No. 1 size can?

A. This is the No. 1 size can, the smaller of those mentioned.

[fol. 571] Mr. Fowler: I would like to introduce that No. 1 can in evidence and have it marked Defendant's exhibit No. F-15.

There being no objection thereto the said can was admitted in evidence and so marked (which exhibit will be certified and presented to the Court under proper procedure).

By Mr. Allison:

Q. Mr. Bruce, was that can offered in evidence purchased under the contract?

A. Yes, sir.

Q. Was the purchase price of that contract a part of the consideration of any of the notes in the suit?

A. It may have been and may not have been.

Q. When was that can offered in evidence bought from the American Can Co.?

A. I don't know, but I would like to explain that answer by pointing out that we buy several million cans a year and it is impossible for me to follow the life of any individual can through the plant. I know that as far as the notes in question are concerned they involve the purchase of cans of this particular size.

By Mr. Fowler:

Q. These identical cans?
A. Yes sir.

By Mr. Allison:

Q. Mr. Bruce, the consideration for the notes covered the purchases made not more recently than the year 1939—is that correct?

A. I do not know at the moment. I could look it up and see.

Q. You have no idea whether the exhibit offered was bought prior to the year 1940?

[fol. 572] A. I don't know that it was—I don't know that it was not.

Mr. Allison: It appears from the witness' testimony that this is immaterial, irrelevant and incompetent and not to have any bearing upon the issues in this case. It might have been bought last week. This defense claiming discrimination is during the time of the transaction which resulted in the giving of the notes and the evidence shows that it has been a great many months since that consideration was fixed, and subsequent transactions would simply be foreign to the issues.

Mr. Fowler: If the Court please, that is the identical size and the identical can which he states that he purchased.

The Court: I will over-rule the objection and let it go in.

Mr. Fowler: That the Court may understand, there is a very short paragraph here which I think will make it clearer to the Court what we are talking.

(Thereupon counsel read from the Contract.)

Q. Now, Mr. Bruce uses the term here "Cans most nearly similar." State whether or not this Can No. 1 is most

nearly similar to the individual service can which you purchased among group of cans called for in the contract.

Mr. Allison: Objected to as calling for the conclusion of the witness and for a matter of opinion. The exhibits are before the Court and the Court can draw its own conclusions on the law.

The Court: Looking at the cans I would not say they [fol. 573] were similar at all. Go ahead.

A. And the cans listed in the contract No. 1-70-A under Sellers Standard sizes of cans the No. 1 can—Exhibit F-15 is the can most similar to any other can in the individual service group, that is the 314 the 312—the 309 and the 300.

Q. We have all those cans in evidence except the 309?

A. The 309 I have in evidence.

Q. Do you have the 309 can?

A. I have a 309 can here.

Q. This was purchased from the American Can Co.

A. It was.

Q. It is one of these little individual service cans?

A. Yes sir it is.

Mr. Fowler: I would like now to introduce in evidence the one that makes the four individual service group complete which I did not have a sample of yesterday, and ask that it be marked Defendant's Exhibit F-16.

Q. When was that can purchased, Mr. Bruce?

A. Sometime between the years 1937 and 1938, sometime in the years, 1937-38.

Q. Aside from that, if the Court please, it illustrates the sizes so that the Court can know the sizes we are talking about.

By Mr. Allison:

Q. What is the purpose of this label on here?

A. The label underneath was marred so we just put a representation of the label over the top of it.

By Mr. Fowler:

Q. It is not introduced for the purpose of showing the label, just to show the size?

Mr. Fowler: We now offer the can in evidence that is in question.

[fol. 574] Mr. Allison: The Plaintiff objects to the exhibit offered by the Defendant on the ground that it is not shown that the same is involved in the consideration represented by the notes here sued upon, nor within the issues presented in this cause.

The Court: Objection over-ruled.

Thereupon said exhibit was marked and admitted in evidence; (which said exhibit will be certified and presented to the Court under proper procedure).

By Mr. Fowler:

Q. Mr. Bruce, I have one letter here that I think is of interest on this point, dated Feb. 4, 1938 which I hand you and ask you if you received that through due course of mail from the American Can Co.

A. We did.

Q. There are some pencil notations at the bottom of the letter which we do not know why they are there, and we are simply rubbing them out because they are not introduced in evidence. You received this in due course of mail—you say?

A. Yes sir, we did.

Mr. Fowler: I ask that that letter be marked Defendant's Exhibit F-17 and may I offer it in evidence.

Mr. Allison: I object to it on the ground that:

1. It is incompetent, irrelevant and immaterial.

2. If appears upon its face that it is entirely remote from the proceedings complained of and now discussed by the witness which occurred in the summer of 1946, the letter bearing date of 1938.

[fol. 575] 3. It is not shown to be connected in any way with the subject matter of this litigation or the consideration of the notes sued upon.

Mr. Fowler: It is simply the passing of all of these cans, or all of them, the 202, 309, and 202,312, f. o. b. Baltimore with freight equalized Tampa—water rate or freight.

Mr. Allison: I would like to add the further ground that the quotation of prices is not a violation of the Statutes as complained of and further that the letter does not in any

way constitute or establish a bona fide effort by the Defendant to buy cans in the summer of 1940.

The Court: I over-rule the objection.

Thereupon letter dated Feb. 4, 1938 from the American Can Co. to Bruce's Juices, Inc. was read to the Court and marked in evidence as Defendant's Exhibit F-17 and is in words and figures as follows:

DEFENDANT'S EXHIBIT F-17

American Can Company
1st Avenue & 22nd Street
Tampa, Florida

M. M. Slayton, Local Sales Manager.

Feb. 4, 1938

Bruce's Juices, Inc., Tampa, Florida.

Attention: of Mr. J. Adams Bruce, Subject: Special Lithographed Cans

GENTLEMEN:

After our telephone conversation on February 2 the writer immediately contacted our New York office for information and quotations on 202 x 309 and 202 x 312 special lithographed cans.

It is understood that sketches are to be mailed to you from our Art and Lithographing Department today by air-mail for your approval. The sketch of the can body is to [fol. 576] be of the same design and colors as was approved by your Advertising Agency in New York. The end sketches are to be for grapefruit or orange juice. The wording on the end sketches to include the word "sweetened" for orange juice and the word "unsweetened" for grapefruit juice.

We quote the 202 x 309 can lithographed with three colors and lacquered, lithographed ends with clear lacquer, in lots of 250,000 up to 500,000 at $12.85 per M, in lots of 500,000 or over, $12.55 per M, f. o. b. Baltimore, freight equalized with Tampa, Florida, on water rate of freight.

202 x 309 cans packed 24 each in corrugated cartons weigh approximately 113 pounds per M cans. 202 x 309 cans packed 575 each in Canco Carriers weigh approximately 100.5 pounds per M cans. In bulk 202 x 309 cans weigh approximately 97 pounds per M cans. The above weights include the ends packed in tubes.

202 x 312 special lithographed cans: We quote 202 x 312 cans lithographed and lacquered same as above mentioned description in lots of 250,000 to 500,000 at $13.15 per M, in lots of 500,000 or over, $12.85 per M, both quotations f. o. b. Baltimore, Maryland, freight equalized with Tampa, Florida, on water rate of freight.

The plain corrugated carton prices first quarter 1938, 24 each 202 x 312 in lots of 5,000, $3.10 per C, in lots of 10,000, $3.05 per C, in lots of 25,000, $3.00 per C.

202 x 312 cans packed 24 each in corrugated cartons weigh approximately 117 pounds per M cans, 202 x 312 cans packed 575 each per Canco Carrier weigh approximately 103.75 pounds per M cans. 202 x 312 cans in bulk weigh approximately 100.5 pounds per M cans.

There will be an additional charge of approximately $125.00 for lithographing plates.

The freight rate from Baltimore to Tampa, in carlots minimum 14,000 pounds via all water shipment 59c Cwt., by all rail $1.16 Cwt.

If your order is placed for cans to be shipped in Canco Carriers, it will be necessary that they be shipped by rail, as the boat lines do not accept Canco Carriers. There will also be an additional charge of 6c for each Carrier.

If there is any further information you desire, please let us know.

Very truly yours, (Signed) M. M. Slayton, Local Sales Manager.

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[fol. 577] Mr. Fowler:

Q. Mr. Bruce, you referred to blended juice. What kind of juice is blended juice?

A. Combination of orange and grapefruit juice in the same can.

Q. Who put out the "One-Up" juice?

A. Engleman Gardens, Edenborough, Texas.

Q. What Valley did you refer to as having a plant in the Valley?

A. The Rio Grande Valley on the Mexican border in Texas.

Q. Mr. Bruce, did you or not make plans to pack individual service grapefruit and orange juice in Texas.

A. We did.

Q. When was that plan made?
A. Among other times in the Fall of 1939.
Q. In 1940 why did you not pack in the 312 can in Texas?

Mr. Allison: If the Court please, I object to the question because it calls for a conclusion of the witness, some mental decision that he made, not in any way binding upon the Plaintiff.

The Court: Objection over-ruled.

(Last question was read to the witness.)

A. Because the juices we were packing in Texas were the same juices we were packing in Florida, grapefruit juice, and *and* it is not sound merchandising to pack two juices in two cans with only a quarter of an ounce between them and both selling to the retail grade for five cents.
Q. What would the 314 can cost you in Texas?

Mr. Allison: O object to that because it is immaterial and irrelevant. I would like for the record to show that the Texas canners were using the 312 can. The record also shows, I believe, or will show if it does not, that the [fol. 578] same line of machinery can make the two cans, and the record does not show that there was anyone in Texas buying the 314 can, and there is no predicate laid for any price there. I submit that it is highly improper and incompetent for Mr. Bruce to try to testify what he thinks the price should have been, or how he figured it. There is no predicate yet for quoting a price in Texas.

The Court: I over-rule the objection.

A. The price on the 314 can at our cannery in the Valley which was located eight miles from Engleman Gardens' Cannery according to the pricing policy of the American Can Co. was $10.14 for the plain portion of the can, f.o.b. Houston, plus the freight to Houston.
Q. To Houston, did you say?
A. Plus the freight to the Valley which was approximately fifty cents per thousand, making the price of $10.64 for the plain portion of the can at our cannery in Santa Rosa, Texas while the Engleman Gardens would be purchasing the 312 can at their Cannery about eight ... distance at $10.178 a thousand, based on the same freight rate by which the other prices are calculated.

Mr. Fowler: Now, if the Court please, in the testimony taken by Mr. Allison in New York in July for the American Can Co. Mr. Howry in connection with what we claim is a secret price, claimed and testified that he had given Mr. Bruce this price of $9.68 on Sept. 28, 1939 by letter. We informed them that we did not have the letter and Mr. Howery said he would produce it. Mr. Allison said he had a photostatic copy in Tampa and would give it to us. Since that time he has stated that he was mistaken and [fol. 579] did not have a photostatic copy. The last time we were before the Court, we called upon them to produce such letter and if they have it we would like to have it produced and if they do not, I would like to have it acknowledged because I think we are entitled to it in view of the testimony given by Mr. Howery saying that he had sent such a letter.

Mr. Allison: It is my understanding, if the Court please, that members of the Bar are always under oath following their admission. I have advised Mr. Fowler days prior to this hearing in writing that the unfortunate statement I made was an error due to a faulty recollection; that the letter I had in mind had already been introduced in evidence; and I was mistaken on the date. It was the letter written by Mr. W. T. Taylor over Mr. Slayton's name. And, if it will add any further verity to the acknowledgement I have already made, let it be considered that I am now making it and will make it under further oath if necessary.

Mr. Fowler: I trust that the Court will not impute anything to Mr. Allison other than what he has just stated but what I do want now is the letter that Mr. Howry said that he give us this information in, or a copy of it, that is be produced and that they give us such a copy because I gave them notice and that hearing was last July. The statement of Mr. Howry on that point is on page 77.

Mr. Allison: I would like to say, may it please the Court, that Mr. Howry made the direct statement that he had quoted Mr. Bruce a price of $9.68 on three twelve cans in Texas. Naturally I talked to the witness before he took [fol. 580] the stand and he did not recall whether it was by letter or orally and I misrecalled the letter which we offered and which I think was dated June 1940 instead of 1939 in September, and that was my error in memory.

But, Mr. Howery did testify that it was his recollection that he had quoted the price of $9.68.

Mr. Fowler: He testified that he gave it to him by letter, both in direct examination and in cross-examination as I recall.

(Thereupon Mr. Fowler read the record in the former hearing in New York to the Court)

The Court: I gather that Mr. Howry was mistaken when he said he wrote the letter.

Mr. Fowler: Yes sir.

Q. Mr. Bruce, did Mr. Howry quote you the price of $9.68 in September 1939?

A. No.

Q. Did he quote it to you at any time in 1939?

A. No.

Mr. Fowler: I now offer, if the Court thinks it necessary to prove by this witness, that the California Packing Corporation, Stokely Bros., American Packing Co. or the Hawaiian Pineapple Packing Co., Libby-McNeil & Libby, and the Great Atlantic & Pacific Tea Company were competitors in the marketing and selling of juices with Bruce's Juices in various States of the Union.

The Court: You go ahead with your case.

Mr. Fowler: O. K.

[fol. 581] Q. Mr. Bruce, going into the question of the grocery trade, you have mentioned here several companies as competitors of yours. First, the California Packing Corporation. Does it have a factory in Tampa, Fla.?

A. Yes sir.

Q. Does it pack fruit and vegetable juices in Tampa, Fla.?

A. Fruit juices, I know.

Q. Does Stokely Bros. have a factory in Tampa, Fla.?

A. Yes sir.

Q. Do they pack juices?

A. Yes sir.

Q. What juices, if you know?

Mr. Allison: I object unless a better predicate is laid, unless the witness has information from personal knowledge, or the best evidence, of the facts as to what he packed in these plants.

The Court: I think he ought to know that. I will let him answer the question.

A. Grapefruit juice, orange juice, and blended juice, among others.

Q. Where are their factories with reference to the location of the American Can Co. as compared with the distance from your factory, the Bruce's Juices Factory; are they nearer or farther or to what extent are they farther?

A. The California Packing Corporation and Bruce's Juices are approximately the same distance from the American Can Co. and the Stokely Plant is about twice the distance from the American Can Co. as Bruce's Juices is.

Mr. Allison: If your Honor please I object to the continuation of this line of testimony and move to strike that already given unless it appears that the juices referred to [fol. 582] as being packed by the alleged competitors were in size of cans competitive with those involved in this litigation.

The Court: You can bring that out on cross-examination.

Mr. Fowler:

Q. Mr. Bruce, generally state whether or not these juices are sold in competition with the juices canned by Bruce's Juices.

A. They are.

Q. Are you familiar with the Hawaiian Pineapple Co. Ltd., Libby & Libby and the Great A. & P. Tea Co. and the Morgan Co.?

A. Yes sir.

Q. Do you know whether or not these Companies pack juices which are sold in the grocery trade in the various states of the U. S.?

A. Yes sir.

Q. Do they?

A. Yes sir.

Q. State whether or not these juices are sold in competition with the juices canned by Bruce's Juices?

A. They are.

Q. Mr. Bruce, from your knowledge of the canning business, and particularly as to the business of canning fruit and vegetable juices, your familiarity with the California Packing Corp. and Stokeley Bros., what would you say with reference to the amount of juice canned in the Tampa Plant by these two Companies in comparison with that

canned by the Bruce's Juices during the year 1940, 1941 and 1942.

Mr. Allison: I object to the question unless it is shown that this witness has some knowledge of his own, it not having been shown, that he has ever been in the Plants mentioned.

[fol. 583] The Court: I think he ought to have some knowledge of the facts before he gives his testimony as to his source of information or knowledge.

Q. What size plant does the California Packing Co. have in Tampa as compared with Bruce's Juices?

A. About the same size.

Q. What would you say with reference to Stokely Bros.

A. Smaller.

Q. How long have you been familiar with the canning business, Mr. Bruce?

A. Since 1907.

Q. How long have you engaged in that business in Tampa.

A. Since 1930.

Q. Are you familiar generally with the plants of these two Companies?

A. I am.

Q. Are you familiar with their pack? Do you know approximately their pack?

A. We are larger packers than either of those two.

Mr. Allison: I move to strike the answer as not responsive to the question.

(Thereupon the question and answer were read to the Court.)

The Court: I think that is a proper question and answer.

Mr. Fowler:

Q. Mr. Bruce, with reference to Morgan Packing Co., what juice do they pack in the individual service cans?

A. Tomato Juice, among others.

Q. State whether or not that is sold in competition with Bruce's Juices.

[fol. 584] A. It is. They pack in or near Austin, Indiana in the 202 x 312 can, tomato juice and we have been told by the American Can Co. that in the Fall of 1940 after they—— (witness was interrupted)

Mr. Allison: I dislike to interrupt but there is more than one person connected with the American Can Co. And if Mr. Bruce would testify who made the statement it would probably save objection.

A. I was told by Mr. Nugent. I have heard Mr. Nugent, of the American Can Co. state that in the Fall of 1940 they sold to the Morgan Packing Co. the 202 x 312 diameter can at a price of $9.68 for the plain portion of the can. The plain tin portion of the can, and that that can was made either in Indianapolis or Chicago and that they equalized the freight with their canning factory in Austin, Ind.

Q. Now, Mr. Bruce, from your experience as a canner, and in the business of merchandising, and your familiarity particularly with the business of Bruce's Juices, and the juice business generally, state whether or not the giving of the lower price to Engleman Gardens as has been brought out here, damaged the Bruce's Juices?

A. It did.

Mr. Allison: I object, it not having been shown that the lower price was given on the same can, voluntarily selected and used by the Defendant at the time in question, and which the Defendant has stated that he advised the American Can Co. that he intended to use.

Mr. Fowler: If the Court please the testimony is in the record that this was the same can and it was the same grade and quality and that can be pointed out from the record, and further that the change in the size of the can did not change the grade and quality and that, of course, is ele- [fol. 585] mentary (Counsel arguing to the Court).

The Court: Let him answer the question.

(The last question was read to the witness.)

A. It did.

Mr. Allison: If the Court please I would like to add a further ground that it is immaterial whether this witness is damaged or not. He is seeking to set aside and avoid the payment of the notes on the ground of this discrimination in price. If he were seeking notes in the District Court under the Robinson-Patman Act, it would be material but it is immaterial here. The question is, was the transaction unlawful, that is the question raised by the pleas.

Mr. Fowler: In view of that statement, if the Court holds that it is immaterial whether we are damaged or not, we will be glad to stipulate to that effect.

The Court: I am not holding anything. There is a whole lot of evidence here that I don't think has got but very little to do with this case, but I am leaving the field and the door wide open for you to offer anything; but I am not ruling on that question now; I will rule on all of these matters when we get to the final hearing on it, so you go ahead.

Mr. Allison: I would like to add one further ground, that the question is based on a false premise in that it suggests that there was a lower price to Engleman Gardens, whereas the records shows that Engleman Garden factory was [fol. 586] paying four cents per thousand more for the 312 can at its factory than the Defendant was paying for the 314 can at the Tampa factory.

The Court: You can argue that question.

Mr. Fowler:

Q. Now Mr. Bruce, under the pricing policy if you had purchased the 312 cans or any other little can, as you did, from the Baltimore factory of the American Can Co. would you not have had to pay freight from that factory to an operation that was nearer to Baltimore than any other factory or pricing point of the American Can Co.?

A. Yes sir.

Q. Did you pay freight from Baltimore to Bridgeville, Del.?

A. We did.

Q. Now, Mr. Bruce, did the granting of the lower price on the 312 can to Morgan Packing Co. and the refusal to sell you at the Tampa factory on the same basis, that is, with freight equalized at Tampa, damage the Bruce's Juices?

A. Yes sir.

Mr. Fowler: If the Court please, the Court has indicated at various times, which is not in the record but which I think ought to go into the record, and which ruling of the Court heretofore given orally the Court may have changed for one reason or another, and among these reasons, one being in view of the stipulation made by Counsel for the Plaintiff this morning, or rather an admission, which he called a stipulation, and the statement of the Court being that he was not going to consider the question of quantity di-

counts; and in view of that fact I had not prepared to go into that. However, yesterday when we started this hearing the Plaintiff made an observation or which he called a stipulation, which I call an admission into the record, which [fol. 587] I would like at this time to have read to the Court. It is important. Will you please read that, Mr. Johnson?

(Thereupon the following was read from the record by the Reporter.)

Mr. Allison: In the present state of these consolidated cases Nos. 23454 and 23569 Law, the Plaintiff concedes and offers to stipulate on the record that the Defendant, for the purposes of the pre-trial conference, has the right to rebut by competent, material and relevant testimony if any it has, the evidence heretofore adduced by the Plaintiff, as prima facie justification for quantity discounts, which Plaintiff admits it allows to its purchasers of packers cans, under the terms, conditions and provisions set forth in its contracts identified herein as Defendants Exhibits 3 to 28A inclusive, and under the facts and circumstances appearing from Plaintiffs Exhibits 2 to 14 inclusive, dated April 2nd, 1943: and in the event such facts are adduced by the Defendant in rebuttal of the Plaintiff's prima facie proofs of justification of such discount, then the Plaintiff further concedes that it is then the province of the Court to pass upon and determine the legal condition of all of the facts adduced by the Plaintiff and Defendant at the pre-trial conference for the purpose of determining whether or not there are issues in these consolidated cases to submit to a jury, or for the purpose of making up issues to submit to a jury, and this statement is not a waiver of any proof or admission for the purpose of dispensing with proof of any of the defenses interposed by the defendant.

By Mr. Fowler: The Court has stated on previous hear- [fol. 588] ings that the Court would not consider the question of quantity discounts at this hearing as a defense in this case. If I am wrong I will be glad to be corrected. Therefore that question was taken out of the preview of today's hearing insofar as our position was concerned. We simply asked the Court to at the right time get that into the record so we would have the opportunity to have it passed upon.

By the Court: What I said was that I was not going to

disturb the set-up provided for in the contract about quantity discounts, and that is all I said about it.

By Mr. Allison: The Plaintiff in response to that suggests that the Defendant could not be taken by surprise by the statement inasmuch as the defendant on September 22nd filed suit for an injunction in the United States District Court for the Southern District of Florida, seeking to enjoin this hearing, and the very point concerning his ability to introduce such evidence was argued in that proceeding.

By Mr. Fowler: And in which proceeding it was stated by the Defendant here, the Plaintiff there, knew that the Court had stated that he would not consider quantity discounts. Is that not correct?

By Mr. Allison: I think the statement was made in the Bill of Complaint, which was not my recollection of the Court's ruling here; but the point I made is that it was argued, that the question of lack of jurisdiction in this court [fol. 589] was argued to the Pleas and overruled, and the Pleas stood and there was no ruling that evidence would not be received at the pretrial conference in support of the Pleas.

By Mr. Fowler: I am very happy to go into the question of quantity discounts. I would just like to have the Court's ruling on this point as a matter of procedure. We have taken the position and it is in the evidence and we have read it to the Court that we have shown quantity discounts particularly by the testimony of Mr. Nugent and Mr. Ong at the hearing in New York on the first and second of April 1943, that at that time in the testimony of Mr. Ong or during his testimony the Plaintiff offered exhibits, I believe numbers two to fourteen, in an endeavor to justify these discounts, to which exhibits we objected strenuously and which objections are now in the record. It is my view that the proper procedure would be for us to finish our main case on our defenses without attacking justification. If the Court rules that those exhibits are properly introduced, which we think they are not, and it becomes material, we then would have the opportunity to attack those exhibits if the Court permits them in evidence; but I do not see any use in putting a lot of evidence in in attacking exhibits which are not in evidence, and it would be a waste of time; and maybe if we were to stop here and read the evidence surrounding those exhibits we would save time, to see whether or not the Court would let them go in evidence. We

have asked the Court to let us cross examine on them more fully. These exhibits were introduced in evidence at five-thirty on the second day of our hearing after we were [fol. 590] through. The purpose of the hearing up there was to take evidence on our behalf, to get admissions and information from the officials of the American Can Company. They introduced these exhibits as I say on five-thirty on the second day. Plans had been made as far as we were concerned to finish. They do not work in New York on Saturday and said they were all going home and everybody was in a hurry to leave, and when we asked to go back up there and examine them on it the Court said that he would not permit it.

By the Court: That was on the theory that I was not going to disturb the theory of the quantity discount rates and the provisions about quantity discounts as provided in the contract. In other words they have certain provisions in that contract for quantity discounts and "there is no necessity in offering any evidence to go behind those provisions as to quantity discounts" I don't believe. I do not know whether the exhibits you are talking about go to that question or to some other question.

(Thereupon the hearing was adjourned until October 11th, 1943, at 11 o'clock, A. M., at which time the hearing was duly reconvened and the following further testimony taken and proceedings had.)

Thereupon, the Defendant to further maintain the issues on its behalf then and there recalled the witness, J. Adams Bruce, who further testified as follows:

Direct examination (Continued).

By Mr. Fowler:

Q. Mr. Bruce, in locating a canning factory for the canning of vegetables and fruits, and vegetable juices and [fol. 591] fruit juices, what two principal factors must a canner take into consideration. That is a little general but I think the answer will clarify it?

A. The position first, or the location of this plant in relation to the materials he is going to can; second, the position of his plant in relation to other materials and facilities aside from the raw product.

I can best explain that by our choice of the location in Tampa, which is as far as the raw material, that is citrus fruit is concerned, may not be as ideally located as for instance the plants in Winter Haven and other portions of Polk County. The fruit has to be drawn into Tampa from surrounding areas, where it is right at their door. But we have facilities here, such as can manufacturing plants, and in more peaceful times water shipping facilities that offset the hauling of citrus fruits from the heavier citrus areas into Tampa.

To sum it up, in locating a canning plant it is necessary to make a compromise between all of the factors that have to be considered in canning, and choose your location accordingly, having a little added expense in one which is offset by a saving in others.

Q. That rule does apply, and you do have to make that same compromise in the Texas location as you do here?

A. The same compromise could be made in the Texas location, but as far as a canning plant location is concerned it is over-weighed by the area in which the fruit is grown and so it is not feasible to locate your cannery at Houston where the can company plant is. It is necessary to locate the plant down in the valley where the fruit is grown.

Q. The American Can Company's plant was at Houston, was it not?

A. That is correct. And it is customary that all cans [fol. 592] are bought F.O.B., Houston insofar as the valley is concerned and the freight is paid on all cans that are shipped from Houston into the Valley.

Q. Paid by whom?

A. Paid by the canner.

Q. The purchaser of the cans?

A. Yes, sir.

Q. Mr. Bruce, in ordering cans from the American Can Company how did you give your orders?

A. The orders were sometimes given by letters and sometimes by telephone. I suppose there were a few isolated instances where if one of the can company salesmen happened to be in our plant that the order may have been given to him, but that was a very unusual occurrence. It was customary to telephone our daily requirements as far as grocery sizes were concerned to the can plant and as far as individual service cans were concerned it was customary to order by letter or by wire or by telephone.

Q. Were all of those orders given to the local plant of the can company?

A. That was our general practice.

By Mr. Fowler:

Now if the Court Please, as far as I can think of that concludes Mr. Bruce's testimony in chief except for some questions, in fact a good many questions we would like to ask him in connection with the Plaintiff's exhibits, I believe it is from two to fourteen, anyway the exhibits in which they seek to justify those quantity discounts, which exhibits are not yet in evidence; therefore I would simply like to state that after that point is disposed of and if the Court should rule that they are in evidence we want to ask him questions about them at that time, or we could do that now be- [fol. 593] fore taking him off the stand. But I do not want to take him off and have the discussion come up later as to whether we did not use him on that point.

By Mr. Allison:

We have offered them and Mr. Fowler objected to them.

By the Court:

Suppose you go on and examine him about them then. I will rule on it later. I want to get through taking this testimony. Go ahead and examine him about them.

By Mr. Fowler:

With the notation, according to the Court's ruling, we are not questioning Mr. Bruce regarding Plaintiff's Exhibits 3 through 14, which exhibits were offered in evidence by the Plaintiff when testimony was being taken on behalf of the Defendant in New York City on April 1st and 2nd, 1943, under the conditions and subject to the objections interposed by the Defendant at the time of the offering, and which objections have not yet been passed upon; therefore we would like to have it considered by examining Mr. Bruce or any other witness in connection with these exhibits at this time that it shall not be considered as waiving our objections to the same.

I will call to the Court's attention so that the Court may know about what we are examining him, that the exhibits in question are, first:

What they call "Packer's Can Sales-Roadmen's Expense," which contain instructions as to how charges are to be made as between three groups, those three groups being customers who buy more than five million or more worth of cans who get 5%; customers who buy them five hundred thousand to five million who get between one and five percent and those customers who get no discount, in which it lists as being in the group "a" which is the one [fol. 594] who gets 5%, California Packing Corporation and Libby, McNeil & Libby; those who get from one to five percent and being classified in the "b" group being all of the other corporations that we have mentioned in the hearing, which we have alleged get between three and five and which they have alleged in the testimony and admitted that they get between one and five. Among others Stokeley Brothers; Morgan Packing; Hawaiian Pineapple; Great Atlantic & Pacific Tea Company; and others; and of course leaving Bruce's Juices in the third class; the exhibits five, six, seven, eight and nine being the figures which the witness testified were taken from the books of the corporation showing how the various expenses were allotted between the group "a" the group "b" and the group "c" customers, the three classes of customers, and these figures are the basis upon which they seek to justify the discounts which they gave to the various classes of customers.

And the exhibits in question cover a period of time from April to November inclusive, 1937; January to November inclusive 1938; January to November inclusive, 1939; and January to November inclusive 1941.

By Mr. Allison:

These exhibits show in one column the month of December and in another column January to November, and then the twelve months are totaled, so that exhibit 6 for example shows the total January to December, inclusive, 1938. That is true in each of the sheets beginning in 1937 through 1941.

By Mr. Fowler:

Could I ask you, Mr. Allison, what do the last figures on the right hand side show, taking exhibit 9 on top?

By Mr. Allison: You are looking at 9?

[fol. 595] By Mr. Fowler: Yes, sir.

By Mr. Allison: The last column are for the preceeding year, in the last column shown on exhibit 8, and the next to the last column on the right is the total for the twelve months of 1941.

By Mr. Fowler: Was there any exhibit handed in for the year 1940?

By Mr. Allison: Yes, sir, that is exhibit 8. Exhibit 5 covers April to December inclusive from 1937. Exhibit 6 covers twelve months in 1938. Exhibit 7, twelve months in 1939; exhibit 8 twelve months in 1940 and exhibit 9 twelve months in 1941.

By Mr. Fowler: If the Court please based on these figures they introduce percentages here as shown in exhibits 10 to 14 inclusive in which is shown:

1st: The amount of sales included in the 5% bracket, that is those buying more than seven million dollars, and in 1937, it is shown to be nineteen million and some hundred thousand; and inasmuch as we have mentioned 1941 a while ago this same 5% group in 1941 shows sales included in this bracket thirty-one million, five hundred and seventeen and some hundred dollars; and that all others receiving quantity discounts, that is the "b" group, was seventy-six million and some dollars. The second figure includes the first figure however.

By Mr. Fowler:

Q. Mr. Bruce, I will hand you these exhibits together with the book "Packer's can Sales Roadmen's Expenses" being Plaintiff's Exhibit #2 and ask you if you have given some thought to these exhibits; have you given some thought to these exhibits?

A. I have, thought and study.

[fol. 596] Q. I will ask you to point out how some of the figures there work out and how they have used the figures to arrive at the conclusions to which they have arrived?

A. The first conclusion I have come to based solely on these figures, and the information as I understand it, on what the Tampa California Packing Corporation Cannery canned or bought from the American Can Company, that is how many cans the Tampa California Packing Corporation would buy as against how many we would buy over the period of over 1937 to 1941,—we both bought approximately a million and a half dollars worth of cans; we have both

presumably sent in our orders by telephone or by some similar ordering method; we have both taken cans right out of the inventory so that when a can was manufactured it was not known whether the can went to the California Packing Corporation or to ourselves; in fact when the cans were actually loaded in the cars it was not known whether the cans would go to the California Packing Corporation or ourselves. We both used the same type of cans and we both paid for the cans in the same way presumably, that is we were paying cash, and I suppose the California Packing Corporation were paying cash. And so that million and a half dollars worth of cans to the California Packing Corporation they set up according to this a sales cost on the million and a half dollars worth of cans of approximately $7100.00, and to the million and a half dollars that they sold to us during the same period they set up a cost of $73,000.00, a difference of $67,000.00.

The next thing that struck me in connection with this was the closing machine situation. With regard to the California Packing Corporation, I do not know exactly how many closing machines they used, but considering the volume of business they do they are approximately the same [fol. 597] number as those that we use, and these figures show that roadmen's assessed expenses, that is the closing machine is in there and the roadmen have to come around there and check it and inspect it; the closing machines of the California Packing Corporation needed approximately the same amount of inspection as the closing machines of Bruces Juices, and their number are about the same, but over this period of 1937 to 1941 they showed that it cost to send their roadmen and other things by district office expenses and so and so, that the cost of sending their roadmen, which is the principal item, from 22nd street over on 3rd Avenue to inspect the machines that were canning a million dollars worth of cans, $3300.00 approximately; and to send their roadmen from 22nd street over in the Garrison where our plant is, a quarter or a half a mile further possibly, and the other expenses, $22,000.00. In their figures down here they have an item called commissions and the manner of determining commissions is set up on page 28 of their little booklet.

We have been contract customers of the American Can Company for 13 years and their regularly paid salesmen have come around periodically and rewritten our contract

and there was not very much trouble involved. There certainly should have been no commissions paid on that.

But as I stated we are in group "c" The California Packing Corporation are in group "..," and the instructions given for setting our commissions are, without reading it all;

"Commissions to packers can sales representatives: selling expense; packer's can and general line sales officers, whose salesmen contact customers in connection with the [fol. 598] purchase of cans on the basis of a packer's can form of contract, will make distribution of this expense to account numbers in accordance with the following instructions.

To this account charge all commissions paid to Packer's cans sales representatives in connection with customers purchasing cans on a packers can form of contract.

Inasmuch as Packer's can sales representatives who receive commissions only contact group "c" customers the account number to be shown will be

And so in setting this thing up no commissions are charged to California Packing Corporation, and no commissions according to this book or as far as we know are paid on California Packing Corporation.

Over the period of 1937 to 1941, the allocated something like $3560.00 of commisisons to Bruces Juices and not one cent of commissions has been paid or should have been paid on Bruces Juices account.

Now on page four of this little booklet they talk about salesmen. They say the only "Salesmen's Contact Time Records:"

The only acceptable method of pro-rating packers can salaries and expense items is on the basis of "Contract" hours. For that reason it is necessary that all salesmen, who have been designated to contact customers purchasing cans on a packer's can form of contract keep an accurate daily record of their contract time in accordance with the following instructions:

And then they designate "a" and "b" customers, purchasing cans on a packer's can contract form, are as follows:

A number of names are given. I point particularly to the name of M. M. Slayton who is the only salesman connected with the Tampa office of the American Can Company whose name is mentioned in that list of salesmen designated [fol. 599] to contact group "a," and group "b" customers.

And it goes on to say:

Salesmen who work out of a packers can sales office and who have been designated to contact packers can customers in group "a" and group "b" must accurately record each day their time which is actually devoted to customers listed under the respective customers classification groups.

Now I would like to point out that Mr. W. T. Taylor who is a salesman of the American Can Company testified that he called on Bruces Juices and he also called on Stokley Brothers, and who are listed on page 17 as being in group "b," and he said that a man who is a salesman like him now and under the same standing called on California Packing Corporation. That man's name is Morris. I would like to point out that neither the name of Morris or of Taylor are mentioned in those authorized to contact or designated to contact "a" and "b" customers, and that is Stokley; and Morris called on Cal.-Pack, so that is what happened to their time.

Salesmen not authorized to contact, although they actually did the calling, salesmen not authorized to contact customers in group "a" and group "b" are not required to report their time, but sales offices to which they are attached must list their names on form 2311 with their 100% respective total normal office hours for each month shown under column headed "Customer's classification number 90."

So that while Mr. Taylor called on Stokley Brothers all of his time is charged up to Bruces Juices.

Now what does that work out for Cal-Pack and ourselves. In the year 1941 with a salesman calling on Cal-Pack the salary of that salesman was $282.00. Mr. Morris, the salesman calling on us, was $4,680.00.

In fact to sell a million and a half dollars worth of cans to California Packing Corporation the salesman charge [fol. 600] was something like $1500.00 for Cal-Pack and somewhere close to twenty thousand dollars, the exact figure slipped my mind, for calling on us.

There are other items here like traveling expenses and it tells you just exactly what to do about the traveling expenses and how to figure it out, on traveling expenses on page 19, and it says that, a salesman uses his automobile, on page 19 under the instructions, what is to be done about it:

To get three quarters of a mile on 22nd street over to Broadway going to Cal-Pack, the travel that they show in

a year is $34.00 for Cal-Pack, but to get from 22nd street to Cumberland, in the Garrison, the travel is $850.00.

Mr. Allison: If the Court please I am going to have to object to Mr. Bruce continuing with his conclusions unless he can show in these exhibits where any individual customer as broken down in these exhibits purports to show the total cost to the customers, and in the figures that he is using I am unable to find the same.

By Mr. Fowler:

Q. Mr. Bruce, will you explain how the item works out from the exhibits?

A. Well, in the first place looking at Exhibit #14, are selling customers receiving quantity discounts is for twelve months ending 1941, and looking at Exhibit #9, Parker's Cans Sales-Roadmen's Expense, January to December inclusive, 1941, why you do not see on there the sales to customers receiving no discount, is it necessary for me to go through the same Junior High School arithmetic in order to arrive at that?

Mr. Allison: I have no idea what he is talking about.

A. We have sales customers receiving quantity discount: customers receiving 5% discounts, thirty-one million five hundred thousand odd customers receiving quantity dis- [fol. 601] count; seventy-six million; which makes it an arithmetic proposition to find out who the customers are receiving from one to four percent, that being approximately four and one half million, reading from exhibit #14.

I have looked over this carefully and it does not give the volume of customers receiving no quantity discount, so you have to calculate it, and calculating it comes out about approximately forty-six million for the year 1941, of the customers receiving no quantity discount.

By Mr. Allison:

None of these calculations on Exhibit #14 or three to fourteen show calculations on any individual customers, and where the figure of $34.00 as traveling expense from the Tampa factory of the American Can to Cal-Pack or Stokley is picked out of the air, it is not based on any of these exhibits because it is not broken down that way.

By Mr. Fowler:

Mr. Allison asked the witness to explain how he arrived at the figures and he was in the course of doing it and Mr. Allison says there is nothing shown as to those receiving quantity discounts, and if he will let Mr. Bruce continue I think he will show his deductions on the other figures.

By the Court:

Suppose he go ahead and explain how he arrives at those figures that he testified to.

A. In Exhibit #14—all my remarks are directed at the year 1941 for the present—exhibit #14 and exhibit #9. In Exhibit #14, in the second column from the left it says percentage of selling expense to sales for customers receiving no quantity discount 5.718%, that is the percentage of selling expense to sales; and on Exhibit #9 the fifth column from the right there is the total dollars and cents of selling expense for customers receiving no quantity discount. The 5.718% mentioned on Exhibit #14 equals the two million five hundred fourteen thousand seven hundred thirty-six dollars and two cents shown on the fifth column [fol. 602] from the right on exhibit #9, from which it is very easy to calculate that the total no discount sales were approximately forty-six million. It is shown that by figuring that if 5.718% equals two and one half million, roughly, then 100% equals forty-six million.

Now in year 1941 Bruces Juices were no discount customers of the American Can Company and therefore their sales expense was apportioned in the forty-six million. Bruces Juices net purchases from the American Can Company in 1941 were approximately two hundred and seventy thousand dollars, which is approximately six-tenths of one per cent of forty-six million dollars, which makes the allocation of the sales expense of Bruces Juices six-tenths of one percent of the figures given in the fifty column from the right on Exhibit #9.

With regard to Cal-Pack we have tried to find out what their annual purchases were from the American Can Company and have been unable to do so, so from our knowledge of the canning business, the fruit purchases, and general information that we can pick up, we have made a very liberal assumption that Cal-Pack purchased three hundred

and fifteen thousand. We know they did not purchase that amount but we made it very liberal so that we would not be deceiving ourselves. And we have estimated the Cal-Pack's purchases for 1941 at three hundred and fifteen thousand and we know they are in the group "a", the 5% bracket, because page 17 of the Roadmen's book says so, and three hundred and fifteen thousand is one percent of the thirty-one and one-half million shown in the left hand column of Exhibit #14 as the customers receiving 5% discounts, and by taking one percent of the figures shown in the third from the left column of Exhibit #9 we arrived at the allocation made for the Cal-Pack Tampa plant, and that shows here, taking one percent for Cal-Pack, from the group "a" persons, and six-tenths of one percent for Bruces Juices for the no discount figures of group "c" and figuring that they bought approximately the same number [fol. 603] of cans, we having set Bruces Juices up at two hundred and seventy thousand and Cal-Pack we have estimated very liberally at three hundred and fifteen thousand, it shows that there were approximately the same services rendered. They have a salesmen salary item on the annual purchases in the year 1941 of Cal-Pack of $282.00 against $4680.00 allocated to Bruce Juices for a lesser amount. They show for travel and auto depreciation, bearing in mind that both the can company's plant and the plant of Cal-Pack and Bruce Juices are all located within Tampa, $30.00 to Cal-Pack and $350.00 to us. Miscellaneous items $37.00 to Cal-Pack, $720.00 to us. Auto depreciation $3.50 to Cal-Pack, $80.00 to us. Telephone and telegraph $21.50 to Cal-Pack and $300.00 to Bruces Juices. Commissions Cal-Pack, evidently there were no commissions charged to them. They charged us $750.00 commissions. Contributions and dues was $7.90 to Cal-Pack, $130.00 to us. Conventions $25.00 to Cal-Pack, $470.00 to us.

Roadmen's Assistants which means a roadmen going up to Cal-Pack and one coming over to us, usually every working day, $450.00 to Cal-Pack and $2280.00 to us.

Auto and marine, whatever we may have had to do with that I do not know because we do not have any marine, $16.00 to Cal-Pack and $110.00 to us.

Transportation and warehouse charge $48.00 to Cal-Pack and $450.00 to us.

Indirect expenses. This was on closing machines, indirect expenses, $31.00 to Cal-Pack and $350.00 to us.

Closing machines, district office expense. I believe their district office is located in Baltimore. $30.00 to Cal-Pack and $360.00 to us.

Engineering Assistance $112.00 to Cal-Pack $68.00 to us. On closing machine Cal-Pack was charged a total of $576.12 [fol. 604] and Bruces Juices $4210.00.

On laboratory $275.00 to Cal-Pack, $1620.00 to us.

Credit department $750.00 to Cal-Pack, $770.00 to us.

Making a total of selling and estimated three hundred and fifteen thousand to Cal-Pack of $1300.00 and selling $270,000.00 worth of cans to us, $15,000.00.

There is another point that I would like to bring out, leaving Cal-Pack out of the picture and that is relationship between our purchasers in 1939 when we were in the quantity discount bracket and our purchases in 1940 when we were not in the quantity discount bracket, by the same manner that I have outlined, although the figures for the no quantity discount customers are not given in this, it is a simple problem to figure out that in 1940 the total no discount customers purchased approximately thirty-six million dollars worth of cans in the year 1940.

Returning to the year *year* 1939 when we were a quantity discount customer, but not a five percent, we find—when I was thinking of 1940, that was exhibit #13—I am now speaking of 1939 and that is Exhibit #12. By simple subtraction in the left hand column we see that the quantity discount bracket that we were in which is bracket "b" for that year purchased thirty-nine million dollars worth of cans from the American Can Company.

Now there is no guess work in these figures because we purchased in both years and we know the figures. In 1940 we purchased three hundred and sixty thousand dollars worth of cans and we were in the no discount class where the total purchases were thirty-six million, therefore our figures for sales and for roadmen's expense would be in the fifth column from the right on Exhibit #8. Our figure for the $440,000.00 worth of cans which we bought in Tampa in the year 1939 would be contained in the figures of the [fol. 605] eighth column from the right on Exhibit #8. It is shown that for the year 1940 our allocation would be 1% of those figures, and in 1939 1.2% ans so by comparing these figures we find that in 1939 they charge us salaries of $640.00 for selling us $440,000.00 worth of cans, and in the

following year, 1940, they charge us $7500.00 for selling us considerably less cans, $360,000.00.

They charged us in 1939 for travel for their salesmen to get from 22nd street over to Cumberland street in 1939 $171.60 and for the same service in 1940 for a lesser amount of cans $1450.00.

There are other items, for auto depreciation $12.00 in 1939, and for presumably the same service $122.00 for 1940.

I won't give them all. Just the high spots.

In 1939 we are not charged any commissions on the $440,000.00 worth of cans bought, but on the same type of contract in 1940, we are charged $1240.00 worth of commissions for a fewer amount of cans.

When it comes to the six closing machine items it seems that in 1939 they charged us $1210.00 for servicing their closing machines in our plant for $440,000.00 worth of cans purchased in 1939 and they charged us $8054.00 in 1940 for only $360,000.00 worth of cans, the same plant, approximately the same closing machines, the same people operating, the same company.

And in the year 1939 they say that their total roadsmen expense covering the sale to us of $440,000.00 worth of cans was about $2900.00, but in 1940 for selling us $360,000.00 worth of cans their sales expense was $24,700.00; that is they show that it cost them about $22000.00 more to sell us less cans in 1940 than it did in 1939.

To further items: comparison of the allocation of sales expense to Bruces Juices in the year 1939 and 1940 when we [fol. 606] bought less cans in 1940 than we did in 1939, and yet they charged to us a convention expense in 1939 of $52.80 as against $725.00 in 1940, and contributions and dues of $20.00 in 1939 based on $440,000.00 worth of cans as against $6240.00 [in $6240.00] * in 1940 based on $360,000.00 worth of cans bought.

A little earlier I gave an overall figure of salesmens salaries from 1937 to 1941 of $1561.00 to Cal.-Pack and the figure for salesmen to Bruces Juices during that period was $22,416.00, although the same salesmen called on both of them, the salesmen of the same rank called on both of them.

I would like to point out in connection with the conventions and canners schools expense, exhibit #2, page 30, the fourth paragraph headed expense.

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* Matter struck out.

"All expense in connection with conventions and canner's schools, such as traveling expenses, decorations, rental on booths, expense of demonstrating machinery, displays, theatre parties, printing programs and so forth, will be charged to account 30019. The auditing department, New York, will redistribute to the proper packers cans sales roadmens expense account number, all such charges on the latest or twelve months accumulated percentage bases for the entire company as shown on for #2312."

For that purpose I think about $200.00 was alloted to Cal.-Pack and a little over $200.00 to Bruces Juices, during the period of 1937 to 1941 reported on.

For an overall picture referring to exhibits #9 and exhibit #14, the selling expense for thirty-one and a half million dollars in 1941 was allocated as being less than $130,000.00, whereas for the balance of their packing cans sales which was one hundred and ten million approximately, the selling cost was more than two million, eight hundred and forty thousand dollars; that is that it cost twenty times as [fol. 607] much, more than twenty times as much, to sell one hundred and ten million dollars worth of cans than it did to sell thirty-one and a half million dollars worth of cans.

By Mr. Fowler:

Q. Were those figures that you pointed out peculiar to 1941?

A. There is similarity in the figures, for instance 1941 just gave the totals, Cal.-Pack $1300.00, Bruces Juices $15,000.00.

Q. Just answer the general question?

A. Yes sir.

Q. 1941 is peculiar to the figures for the rest of them?

A. No, it is the same similarity.

Cross-examination.

By Mr. Allison:

Q. Mr. Bruce, you testified that you never bought cans in small quantities from the American Can Company, but four or five million cans at a time, is that correct?

A. If I testified to that it is incorrect.

Q. It is incorrect?

A. Yes sir it is incorrect. I would like to explain that answer by pointing out that we bought our daily requirements of cans for our grocery orders and those usually were in very substantial volumes. We were canning several thousand cases of juice a day, and it was usually my individual service orders for cans to make those by letter and sometimes those ran as high as four or five million cans at an individual order; but the amounts were never small that were ordered in either grocery or individual service as a rule.

Q. Mr. Bruce, this time contract which you had with the American Can Company was an agreement on their part to meet your requirements for the period of the contract on tin cans and your agreement to buy all your needs from them?

[fol. 608] A. Which one Mr. Allison?

Q. I am talking about the time contract which you filed in evidence as Defendant's Exhibit #3 to #28-A. (The last question was read to the witness.)

A. Among other things I believe those were the terms of the contract.

Q. At any periodic interval such for example as the opening of a canning season, did you give them an estimate of what you thought you would need in cans for the coming season or period.

A. That was the regular practice, to give some idea of what our plans were, which they thoroughly understood of course, they were not bound in any way by that and as we understood it. It was the solicitation from the American Can Company and as we understood it, it was to be a general guide for them in their manufacturing. It was no commitment on us.

Q. In order for them to be able to meet your requirements would it not be necessary for them to have some information so they would have the material on hand to make the cans that you would need?

A. I don't know that much about the canning manufacturing business but as I understand it steel and tin plate was available to them just as fruit and cans were available to us.

Q. Of course there are no tin plate or steel manufacturers in Florida and that material has to be brought to the can factory, that is correct is it not?

A. The American Can Company has told us that they buy their steel from two principal sources. That is all of the information that I have. One is the T.C.I., in Birmingham and the other is the Carnegie Illinois Steel, or some such name in Pittsburgh.

[fol. 609] Q. Mr. Bruce, you know that at the American Can Company plant in Tampa they make the cans from the plate; the cans are not shipped into their factory already formed into cans?

A. On some occasions, there are some occasions they are not.

Q. But nevertheless in this contract they were to stand ready with the finished cans you ordered to deliver it on your requirements, that is correct?

A. Yes sir, upon reasonable notice, which would mean sufficient time to order the plate and get it from the mill, if it were a special order, and to put it into cans. And in connection with another part of that question I have already testified — were using every means possible to reduce our individual service costs and we were asking the American Can Company to use every conceivable means to reduce it, and one of the suggestions that I made to them was that instead of having their cans made in Baltimore and sent down here and formed, *and* that they have the plate lithographed in Baltimore and sent down here and formed, and after several months of arguing with them on that they finally became persuaded and used that method subsequently so they told me of making their lithographed individual service cans and supplying them to us; and in addition and in connection with their special orders for plate it was usual when we placed an order to have some indication from the American Can Company as to when that order would be completed and shipped, and on many occasions, if not all occasions, full consideration was given to the time necessary to get the plate, have it lithographed and have the cans shipped. Only on one occasion on our first purchase of cans, 202 x 300 cans, did we alter that system and then we felt that we needed the cans immediately, and so they had to be made out of plate that had been specially rolled for some other size, I believe the 202 [fol. 610] x 314, and they advised us when we gave them the unusual order that if we required these cans immediately and could not wait until the plate was rolled and sent from the factory that it would be necessary for them

to charge us eleven cents per thousand extra for the wastage that there was in cutting these smaller out of plate that was designed for larger cans, and we told them that was perfectly alright and on the unusual order we paid for that extra wastage and we were billed for it and paid it.

Q. You testified that in the Fall of 1938 you discussed with the American Can Company that you were changing over to a 314 can and discontinuing the 312 can and that you bought the last 312 can during January 1939. That is correct is it not?

A. Yes sir and I would like to explain that situation a little:

In the Fall of 1937 we had been getting very bad service from the American Can Company and our contract was about to expire, or was to expire on December 31st, 1937, or thereabouts. We had made arrangements to go to the Continental Can Company, and Mr. Slayton, the local manager visited my plant first with Mr. Jenkins and then some time later about the first of November with Mr. Nugent, and for two hours I talked with Mr. Nugent and told him the reason I was leaving the American Can Company and going to the Continental Can Company, based on bad service, among other things; and one of the points that I made with him was in connection with the purchase of individual service cans. We had been buying them F.O.B. Baltimore, and Mr. Nugent said that from then on individual service cans could be purchased F.O.B., Baltimore and with carload water rate of freight equalized with Tampa, as that would compensate for them not making any individual service size can in Tampa that we might desire; and it was the understanding between Bruces Juices and the American Can Company as the result of that conversation that cans [fol. 611] of the individual service group would be quoted from them on F.O.B., Baltimore, carload water rate of freight equalized with Tampa if the cans were made in Baltimore.

Q. When was that conversation?

A. In the Fall of 1937 and insofar as I remember all quotations subsequent to that were made either F. O. B. Tampa or F.O.B., Baltimore, carload water rate of freight equalized with Tampa for such of the cans as we purchased, individual service caps as we purchased from the American Can Company for use in Tampa. They were made in Baltimore. With the exception of the 202 x 312 quoted at six

ninety-eight for the plain tin portion of the can and two separate quotations around during June 1940 at which time we were trying to buy the 202 x 312, when we made our statement to the American Can Company in the Fall of 1938 that we — leaving the 312 can and going to the 314 can, we had no idea that the American Can Company was going to make a secret price to one of our competitors, or we never dreamed that the price given to our competitors would not be given to us.

Q. Do you know how many sizes of cans——

A. I am not through yet.

Q. Pardon me.

A. And in addition, in the contract that we had with the American Can Company there is a protection for us in regard to the size of cans that we purchase, and our interpretation of that contract was that in the individual service group, of which I am speaking at the present time, the cost should be fairly proportionate to size, as is made in paragraph 2 of number 4 specifications of the contract. It says:

"Prices of such cans which are not named in the contract shall be fixed by taking from this contract the prices prevailing at the time for standard sizes of cans printed herein most nearly similar to those required by the buyer."

[fol. 612] And in this instance the can is a number one can, most nearly similar to both of them, and undoubtedly the larger should not cost more than the lesser, or the relationship between the two should be uniform.

Based on this number one can the differentials charged us in January 1939 for both cans, was 18 cents. Later on the differentials became 46 cents, but there is no explanation that has ever been given to us as to why that differential should change from 18 cents to 46 cents, and we never expected that it would. That is the reason why in 1940, since they would not alter that, said they would not alter it in June 1940, and they kept a discriminatory price against the 314, and we then tried to buy the 312, and then they went back on the arrangement that we made in the Fall of 1937 that we should have freight equalized at Tampa and they said no we won't equalize freight on Tampa on that can. We also as you know used the 300 can in 1939.

Q. Mr. Bruce, following the portion of the contract which you have just read, do not the following words also appear after the word "buyer":

"And make proper adjustments of such prices in accordance with the number of cans involved, amount of tin plate and other materials, labor, equipment and other elements necessary to produce them."

A. Yes sir. I would like to explain that the price was named, that the discriminatory price was named secretly to Engleman Gardens on September 28th, 1939, and became known to us sometime during April 1940 and that between those two dates we wrote among other letters, four letters which have been introduced in evidence, January 2nd, 1940, February 12th, 1940, March 7th, 1940 and March 13th, 1940, and particularly relative to the letter of March 7, 1940, [fol. 613] in which I pointed out—do you want me to read it?

Q. It speaks for itself.

A. In which I pointed out, in all of these letters, we are asking for anything that can be done to reduce the costs, and in the letter of March 7th particularly we pointed out that we have been successful in reducing our costs of our cartons with Kieckhefer, by having their efficiency man go over the carton and the manner in which we buy and so on, and we asked them if they would not do the same with our cans so that if there was anything such as the number of cans involved and the amount of tin plate or other things, labor and equipment necessary to produce them or any other factor, that would get the costs of the cans down, to let us know about it, and asked them after they had had their efficiency man go over it to give us the result of what it was.

The American Can Company had told us always by its officials, including Mr. Slayton and Mr. Jenkins, various times over the period of 1937 to 1942, that five hundred thousand cans was the quantity necessary to purchase to get the lowest price and in this letter of March 7th I asked them if we could buy in a million or a million and a half lot or anything else, if there was not some way that we could get the cost of the cans down, and we were never advised by them that there was any way; and that in making our can adjustments necessary in accordance with the number of cans involved, the amount of tin plate and other materials and the labor and equipment and other elements necessary to produce that they were costing more to us than anyone else and if there was any way that we

could adjust them or that we could purchase or cooperate with them to have any such thing eliminated.

Q. Do you know how many sizes of cans the American Can Company manufactures?

[fol. 614] A. I have seen it but I don't remember it at the present time. It is certainly less in recent years than it was in 1937 prior to the War Emergency.

Q. Do you recall whether they make substantially a larger number of sizes than the sizes that you use?

A. I am sure they do.

Q. Was it the policy of the American Can Company to furnish you with the printed or any form of quotation of prices on all of the various sizes of cans they manufactured?

A. No, not on all of the various sizes of cans they manufactured, but they have supplied them on cans which they did not manufacture but which they might have. That would be similar to the situation in the 312.

Q. Was that done at your request?

A. Not necessarily. It was always done when we requested it and it was done on many occasions when we did not request it.

Q. Then using your own words, Mr. Bruce, any price they had on a can you were not using was a secret price, is that correct?

A. No, sir.

Q. You had ceased using the 312 can prior to the time you say a so-called secret price was quoted on that can to one of your competitors and that thereafter you tried to buy the can, about a year or over a year after the price was established, is that correct?

By Mr. Fowler: Mr. Allison, that is not correct as to your time limit. The evidence shows that the secret price was September 28th, 1939, and his testimony was that he tried to buy it certainly in the following June: that he discovered the price in April 1940.

Q. (Thereupon the question was read to the Court and Counsel.)

[fol. 615] By Mr. Allison:

Q. They then quoted you the same price at which the can was being sold F.O.B. factory in Texas, $9.68, that is correct, is it not?

A. That is not correct. I would like to explain that answer:

When I say that is not correct, it is not correct according to the pricing policy which Mr. Nugent had given me in the file of 1938 in connection with the shipment of cans of the individual service group to Geneseo, New York.

I would like to pause here and explain:

I believe you have two separate questions in the one question there. I would like to get them separated.

(Thereupon both questions were read to the witness.)

A. I would like to point out that there are two questions which I can not answer at the same time.

By Mr. Fowler: Separate them in answering them then.

A. First, I would like to answer the one about notifying them that we had stopped purchasing the 312 cans in the Fall of 1938. My answer to that is yes. I would like to explain it:

We told them, Bruces Juices told the American Can Company during the summer and Fall of 1938 and after it discovered that the 312 cans would not commercially hold 6 ounces, but should be marked five and three-quarter ounces, Bruces Juices told the American Can Company that its merchandising was tied in with the six ounce idea and other things being equal it preferred to go to a larger can; and in making that statement originally Bruces Juices had in mind that it had purchased previous to that time, the five and a half and the five and three quarter ounce [fol. 616] cans and that on the 4th of February 1938 the American Can Company in a letter had made a quotation to Bruces Juices, it made quotations to Bruces Juices covering the five and a half and the five and three-quarter ounce can and it had quoted the five and three-quarter ounce can and it had quoted the five and three-quarter ounce can of 30¢ higher than the five and one-half ounce can, where the difference was three sixteenths of an inch. In figuring out that the 314 would be the right can, Bruces Juices figured that the difference should not be as great as 30¢, and when it was quoted to Bruces Juices the difference was not as great as 30¢ but it was 18¢, and it was on that premise that Bruces Juices made the statement that it was leaving the five and three quarter ounce can and going to the six ounce can.

As I have already pointed out it is a reasonable assumption that there would be somewhat like the relationship of 18¢ difference between the two cans because the term of the contract between the American Can Company and ourselves, the costs of both cans, other things being equal, was tied into the cost of the number one can.

(Thereupon the qeustion was again read to the witness.)

A. Replying to what I consider the second portion of the question to be I would say that that is not correct. I would like to explain, my reasons for saying that, I would like to explain my answer.

(Thereupon the last portion of the question was read at the request of the witness.)

A. No, not according to the pricing policy of the American Can Company and not according to the basis on which I had bought from the American Can Company 312 cans, that is cans of the same size in the year 1938. In that year [fol. 617] we were buying cans from the American Can Company for use in our Tampa plant on a basis of F.O.B., Baltimore, carload water rate of freight equalized with Tampa, Florida, and we wanted to use some cans and we ordered some cans up in Geneseo, New York. Those cans were made in Baltimore 202 x 312 cans and shipped to Geneseo and I received a freight bill for them so I wrote to Mr. Nugent and told him—I would like to produce the letter in evidence.

By Mr. Fowler: Get the letter and get it in.

A. We wrote to the American Can Company September 15th, 1938:

"American Can Company, New York: Attention Mr. Nugent:

Attached from the Geneseo Jam Kitchen, asking us to remit freight on the car of cans recently shipped to them. Inasmuch as you had already agreed to give these cans to us on a delivered basis at Tampa, Florida, we can not see why we should be charged the freight to a New York point and thus feel that the charge is unjust. Please let us hear from you on this."

And shortly after the 19th of September we received the following letter from the American Can Company signed A. H. Nugent, General Manager of Sales:

"Bruces Juices Inc.: Gentlemen: We have your letter of September 15th with reference to tomato juice cans which we shipped from our Baltimore factory to the Geneseo Jam Kitchen, Geneseo, New York, for your account.

On shipment of these cans from our Baltimore factory to your plant at Geneseo we equalized the freight with our Tampa factory, and if the freight to your factory at Tampa is the same as to our plant at the same point you do not have to pay any freight on the cans.

On the shipment from Baltimore to Geneseo we equalized the freight with our Fairport New York Factory.

[fol. 618] The can rate from Baltimore to Geneseo is 53¢ a hundred weight and from Fairport to Geneseo 23¢ a hundred weight, freight equalized being 30/ a hundred weight. Therefore of the $74.20 total freight we assumed $42.00. In accordance with our contract freight is equalized with the nearest factory of our competitor. The Continental Company have a plant at Syracuse, New York, but the freight rate from that point to Geneseo is quite a little higher than from our Fairport factory so we decided to equalize freight with our own factory making the net freight cost to you quite a little less."

The Continental have a plant in Tampa, Florida, and according to Mr. Nugent in accordance with their contract the freight is equalized with the nearest factory of their competitor and so we bought cans from them and paid for them in 1938 based on their own pricing policy. We brought what we thought was the right thing to their attention and we were told "no, that is not right," we equalized freight with the factory of our nearest competitor.

And then in 1940 we tried to buy the 312 can, and then in order to sell it to us, F. O. B., Baltimore, although they have been selling all their cans freight equalized to Tampa and although they told us that the same 312 can in 1938 when we complained about the price, they say in accordance with our contract we equalized freight with the factory of our nearest competitor, and as far as Tampa is concerned that is the Continental Can Company, and according to thier own pricing policy the price should have been $9.68 F. O. B., Baltimore, water freight rate equalized with Tampa. But it was not that. It was just $9.68 F. O. B. Baltimore. And when we asked them for that in writing

[fol. 619] they indicated on the price list which has already been introduced in evidence, that on that particular can we were going to have to pay 65¢ freight per thousand cans, making the price on that can not $9.68 according to their price fixing policy here but $10.33 in Tampa for the plain tin portion of the can.

By Mr. Allison:

Q. Was there any other canner in Florida using the 312 can in June 1940 or during that year?

A. I do not know.

Q. Do you know what volume of 312 cans was manufactured at the Baltimore factory of the American Can Company in the year 1940?

A. No.

Q. The same can as to 1938?

A. No. May I explain that a little, I would like to explain that answer that I don't know, but I would like to explain there that from the information given us by the American Can Company the statement that you made the other day is not correct. You stated here the other day that the 312 and the 314 cans could not be made on the same machine and the same line.

By Mr. Allison:

I am not on the stand.

By Mr. Fowler:

Just explain whether it can be or not.

A. I would like to explain that from the information given.

By the Court: I think you have already answered the question. Very frankly, I think if you will just answer the questions we will get along better. You have already stated that on your direct examination. Let us get these questions down and answer the question and let the answer be pertinent and relevant without too much explanation, a great deal of which I think is entirely beside the point, and the question. There are some explanations already in the record, at least [fol. 620] once if not more on direct examination. Mr. Allison, you ask your questions and do not have two questions in

one. Just ask one question at a time and we will get along faster.

A. I want to explain that all cans of the individual service group can be made on the same line.

By Mr. Allison:

Q. Without any change?

A. Slight change.

Q. Do you know how much that change is?

A. Mr. Nugent has informed me that the cost is very small.

Q. Then your statement is based entirely upon what Mr. Nugent told you of the cost?

A. That and other things.

Q. And that is the basis for your contention that the prices should be closer together on the 312 and the 314?

A. Among other things, yes sir.

Q. In the conversation that you described on the three-way telephone in June 1940 between yourself and Mr. Nugent and Mr. Jenkins, you stated that you tried to buy the 312 can at $9.68 F. O. B., Tampa, is that correct?

A. That is correct.

Q. What did you do, did you place an order?

A. No sir I told them that I wanted the price in writing. I told them I wanted, since I could not get this 312 on what I considered an equalized basis, the 314 with the 312 proportionately, that we would have to go to the 312. It was then that I discovered that the 312 was not to be sold to me according to the pricing policy, but it was to be F. O. B. Baltimore and I was to pay the freight.

[fol. 621] I was quite confused about the whole thing and could not understand it so I asked them to give me in writing the prices so that I could consider them and place my order which we had been considering placing at that time for tomato juice.

Q. You did not place an order at that time on the phone conversation?

A. I did not place an order but I tried to buy the 312 can.

Q. Did you later place an order for the 312 can?

A. I did not. The basis on which they would sell me being contrary to their pricing policy on which I had bought before, it was of no advantage to me.

Q. And that variance you refer to in price is the reason you did not place an order for the 312 cans?

A. That completely prevented me from placing an order for the 312 cans.

Q. I do not believe that answers the question.

(Thereupon the question and answer were read.)

Q. What was the last date upon which you ordered the 312 cans from the American Can Company?

A. I will have to check that up on my records.

(Thereupon adjournment was had at 12 o'clock P. M., this October 11th, 1943 until 2 o'clock P. M., of the same date when the Court duly reconvened and the following further proceedings were had and testimony taken.)

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Thereupon, the Defendant's witness, J. ADAMS BRUCE, was recalled and further testified on cross-examination as follows:

Cross-examination (continued).

By Mr. Allison:

Q. (Thereupon the last question was read to the witness as follows)

[fol. 622] "What was the last date upon which you ordered the 312 cans from the American Can Company?"

A. On or just before June 17th, 1940.

Q. Do you recall what quantity you bought at that time?

A. I ordered my requirement for tomato juice packing for that season.

Q. (Last question was read to the witness.)

A. I did not say I bought any quantity. I said I ordered.

Q. Was the order filled?

A. No sir, the order was refused.

Q. You did not order any different quantity?

A. I ordered my requirements for tomato juice packing for the season of 1940.

Q. To be used at Tampa, Florida?

A. At Tampa, Florida, and at Bridgeville, Delaware, and at other places.

Q. What quantity of the 312 cans did you estimate or order AT THAT time?

A. the quantity that would be required for my tomato juice packing for Bruces Juices Tomato Juice packing for the season of 1940.

Q. Did you pack tomato juice in the 312 can at Bridgeville, Delaware in 1940?

A. No sir.

Q. When was the last date prior to June 1940 when you ordered the 312 cans?

A. January 11th, 1939.

Q. Was that order filled?

A. Yes sir. I would like to explain that that order was filled in accordance with the contract and the order placed on June 17th on or about 1940, and although replaced in accordance with the contract was refused.

[fol. 623] Q. With whom did you place the order of June 17th, 1940?

A. Mr. Nugent.

Q. Are you now referring to the three way conversation that you testified to in your direct examination?

A. I am referring to the conversation with Mr. Jenkins and Mr. Nugent when they were on the wire in New York and I was on the wire in Tampa.

Q. Did you place any order for the 312 cans after June 17th, 1940?

A. I don't remember placing any but I may have.

Q. Mr. Bruce, I will ask you if you did not make the following statement under oath on June 18th, 1943, in the Federal Court suit:

"Further, I would like to explain that Bruce's Juices would have entertained the purchase of cans 202 by 312 diameter during the year 1940 if the American Can Company had not refused to sell the Bruce's Juices cans 302 by 312 diameter at the same low price at which they sold them to its customer and our competitors Angleland Gardens, and in saying that we would have entertained that does not mean that we would actually have purchased."

Did you make that statement?

A. I think there are 337 fool's cap pages in that, lasting over about seven days. I have not checked it. I would like to see that, if I said that. This statement which I have made here is a much clearer one on the same situation.

Q. Which is the correct answer, were you intending to purchase of were you entertaining the idea of purchasing?

A. We placed an order.

Q. But for no definite quantity?

A. Definitely for a quantity, yes sir.

[fol. 624] Q. What quantity?

A. Our tomato juice requirements for the year 1940.

Q. You testified on cross examination this morning that it was customary for you to make estimates of your requirements and that you did so, but you in this instance made no estimate of your requirements and placed an order on the 312 cans, is that correct?

A. I don't think you have the facts fully before you. It will be found in the correspondence, prior to this conversation, of which at least Mr. Jenkins was aware, that we contemplated the packing of 200,000 cases of individual service tomato juice in Bridgeville, Delaware, in 1940. We had been talking to the canner in Bridgeville for sometime about it and also to the American Can Company.

Q. Did you not state in the afternoon of October 6th that you could not meet competition on the 312 cans put out by One-up because it was inconsistent to pack in two sizes for the same retail price?

A. As I understand what you have said that is not what I said. I would be glad to state for your benefit what I said in regard to packing in two sizes, that it was inconsistent to pack the same commodity in the 312 and the 314 cans for sale in the same market.

Q. Did you not make the statement in your direct examination in the afternoon of October 6th, that One-up was planning to pack orange and tomato juice in 5 3/4 ounce cans?

A. I was so advised by my salesmen and by our distributors.

Q. In 1940, were you receiving any shipments by water from Baltimore of these cans, 314 cans?

A. I would have to check the records to find out. I rather think we were.

[fol. 625] Q. At that time coastwise shipping was still available?

A. Yes sir.

Q. The 314 cost you $10.14 delivered at your Tampa cannery by rail car, did it not, in 1940?

A. I would have to check that. As I understand the price in 1940 was for the plain tin portion of the can, $10.14, car load water rate of freight equalized with Tampa, Florida, and I believe there has been entered in evidence a price list of the American Can Company with that actual quotation on it, dated the 19th of June, 1940.

Q. And you have testified that the 312 can sold f. o. b. American Can Company, Houston factory for $9.68?

A. The plain tin can, so I was informed.

Q. And the freight rate from Houston to the Valley is 50¢?

A. I think that we were advised by the American Can Company that the freight rate was 50¢ per thousand cans.

Q. That then made the 312 can cost the manufacturers in the Rio Grande Valley, $10.18, did it not?

A. That is correct, but if we were buying the 314 there it would have cost us $10.14, plus 50¢, which would have been $10.64, or more than the 312, at our plant, which is a few miles away from the Engleman Gardens.

Q. Then the 314 can costs you $10.14 for the plain cans in Tampa, the 312 cans cost the Valley Canners, $10.18, in the Rio Grande Valley. You complain in your direct examination of competition on those cans from One-up in the Louisiana market, do you not?

A. Read the question, please?

Q. (The last question was read to the witness.)

[fol. 626] A. Yes, sir we complain of competition from One-up in the Louisiana market. I would like to explain why our complaint was made.

Q. I think you covered that in your direct.

By the Court: If he wished to offer the same explanation he offered on direct examination, let us not have that in the record again because it is already in there. If there is some different explanation, he can offer that.

By Mr. Fowler: Your explanation of that is pointed out in the direct examination?

A. Oh, yes.

By Mr. Allison:

Q. Was it possible for you to ship your filled 314 cans from Tampa to New Orleans by water?

A. Yes sir.

Q. Movement of the filled 312 cans from the Rio Grande Valley had to be rail or rail and water, didn't it?

A. Not necessarily.

Q. How would it move by water?

A. From Barnesville to New Orleans.

Q. The Engleman Gardens Factory was not at Barnesville?

A. No sir.

Q. How far from Barnesville was it?

A. Approximately twenty miles.

Q. And it had to be moved from the factory to Barnesville and thence by water?

A. Yes sir.

Q. Do you know what the respective freight rates were on your cans from Tampa to New Orleans as compared to the 312 cans from Edenborough, Texas, to New Orleans?

[fol. 627] A. I am sure they are in the records but I haven't got them.

Q. Your cases are 6 ounce cans, 314 cans, contained more juice than 312 cans, did they not?

A. Yes sir.

Q. Were any other canners in Florida using the 314 cans besides Bruce's Juices?

A. Yes sir.

Q. Do you know whether there were several or three or four?

A. Yes sir.

Q. Were they using it during the period Bruce's Juices was using that can?

A. Some of the period.

Q. Do you know what price they paid?

A. I suppose they paid the same price as we did.

Q. Do you not know as a fact that they did pay the same price?

A. I never examined their invoices but I suppose they did.

Q. Were their products competing with yours in the markets?

A. Competing in some markets.

Q. Were they using the 312 can after June 1940?

A. Not that I know of.

Q. I believe you stated that Mr. Davidson who testified as a witness was one of 75 similar distributors?

A. More or less, yes sir.

Q. Did all the other seventy odd distributors cover the entire territory allocated to them in their contract?

A. Some of them did and some of them did not.

Q. Were they met with competition in all of the areas from One-up?

[fol. 628] A. In many of the areas, I had complaints, great many of them.

Q. Did you have complaints about any other competitors?

A. It is possible that I did.

Q. You do not remember what areas they were in?

A. Who, the ones who complained about One-up?

Q. Do you recall the other areas in which you met competition similar to that experience from One-up?

A. Some of them, I think are Beaumont, Texas; Dallas, Texas, and Amarillo, Texas; Little Rock, Arkansas; Baton Rouge, Louisiana; Shreveport, Louisiana; Memphis, Tennessee; Jackson, Mississippi; St. Louis, Missouri and others.

Q. Was that competition only by One-up?

A. Some instances it was all that was mentioned.

Q. How many lithograph cuts did the One-up 312 cans have on it?

A. I was given to understand by the American Can Company that it had three cuts.

Q. Did you examine any of the cans?

A. Oh, yes, frequently.

Q. Was it a lithographic can?

A. Yes sir.

Q. You have testified that you spend sometime in working on the problems of lithographing. Do you not know whether that can had more than one cut or not?

A. I was given to understand by the American Can Company it had three cuts.

Q. During what years did you operate your canning plant in Santa Rosa, Texas?

A. The citrus seasons 1937-1938 and 1938-1939, and we retained our lease on it for two years after.

[fol. 629] Q. What sized can did you pack there in those two seasons?

A. We packed cans of the grocery sized type, such as the No. 2, 404; the No. 10, and the others in that field.

Q. Did you pack any individual service cans?

A. No, sir, we did not.

Q. You had your lease during the citrus seasons of 1939-1940 and 1940-1941?

A. Yes sir. I would say in connection with that, with what we packed there, we discussed it among ourselves and also with Mr. Jenkins and with the American Can Company and other officials of the American Can Company.

Q. Did you ever compare the prices quoted by the American Can Company to you with the prices quoted by the company to any of your competitors in the same sized can?

A. Yes sir, I have.

Q. When was that?

A. As I remember it, the first opportunity I was afforded of seeing these quotations was after April 1st or 2nd, 1943, when Mr. Nugent in testimony in New York City provided information on that point. Mr. Nugent had told me before after 1940 that he was selling the 312 cans to Engleman Gardens at $9.68, according to their pricing policy.

Q. You misunderstood my question or I did not make it clear. During the years 1937 through 1941, did you compare with Pasco Packing Company, Florida Fruit Canners or any of your competitors, the price you were quoted as comparing with what price they were quoted?

A. I don't know or I don't remember. I will explain that by saying that I have discussed the individual service can with my competitors here and at other places frequently, and it is possible that we compared prices.

[fol. 630] Q. During the years in question, other than the situation you have testified about concerning the $9.68 price on the 312 can, do you know whether different prices were charged you and your competitors on the same sized can by the American Can Company?

A. In making one comparison I know that the American Can Company said the price of the 312 can in January 1939, was $10.06 for the plain portion of the can, and our purchases of the 312 can in January 1939, were made at $12.61 and $12.46, and that included the lithographing, and when they computed the cost of lithographing as quoted to us by the American Can Company it made the cost for the plain tin portion of the can, $10.31 that we were charged in January 1939 against the list supplied by Mr. Nugent of $10.06 for the plain tin portion of the can.

Q. When you say they computed it, who do you mean?

A. Bruce's Juices.

Q. It was your computation, in other words, on the lithographing charge according to some previous schedule?

A. Based on the last lithographing prices that had been supplied to us by the American Can Company.

Q. Was there any enameling charged in there in addition to the lithographing?

A. The charges were for lithographing the body in three colors and lacquering the body on; for lithographing the top in one color and lacquering the top and lacquering the plain bottom.

Q. There was no enamel?

A. If you mean by enamel on the inside of the can, no, there was not.

(At the request of counsel the following question was read to the witness.)

Q. During the years in question other than the situation you have testified about concerning the $9.68 price on the [fol. 631] 312 can, do you know whether different prices were charged you and your competitors on the same sized can by the American Can Company?

A. I am taking a moment to think about any other instance there may have been. At the moment I cannot recall any others. There may have been.

Q. You testified this morning on a percentage which you applied from the California Packing Corporation, Tampa plant, in connection with the quantity discount scale?

A. Yes sir, a percentage of the total, 5 per cent discount.

Q. Mr. Bruce, how many times were you in the Tampa plant of the California Packing Corporation during the years 1937 through 1941?

A. Several times.

Q. Were you in the portion of the plant where the cans are packed?

A. Several times.

Q. What was the occasion of the time of your last visit?

A. I don't remember.

Q. When was the time of your first visit?

A. I don't remember.

Q. How many times during the same period have you been in Stokely Brothers, Tampa plant?

A. Not many but several.

Q. You have been in the portion of their plant devoted to filling cans, juices and fruits?

A. Yes sir.

Q. Did you make any inquiry of California Packing Corporation prior to this hearing as to what portion of their entire purchases of cans was used in their Tampa factory?

A. No.

Q. Did you make such inquiry of Stokely Brothers?

[fol. 632] A. No.

Q. Did you make any inquiry of either of those companies as to the sizes of cans they bought for their Tampa plant?

A. No sir, but I would like to explain I had a pretty good idea what they were.

Q. Then on what basis did you arrive at the percentage you used this morning?

A. There are many factors by which it can be done.

Q. I am asking you how you arrived at it?

A. I arrived at it in many different ways. For instance, in one year, the State of Florida, some department of the State of Florida which has to do with fruit inspection, published the number of boxes of fruit that Stokely purchased, the number of boxes of fruit that Cal-pack purchased, and the number of boxes of fruit that we purchased. In that particular year, I remember we purchased 646,000 boxes of citrus fruit, and while I don't remember the exact amount that Stokely and Cal-pack purchased, I remember that adding the two together did not equal the amount that we had purchased; in other words, Stokely or Cal-pax that particular year together had not bought as many boxes of fruit as Bruce's Juices had.

Q. You mean in Florida?

A. That is correct.

Q. Did they pack anything in their plants except citrus fruit?

A. Stokely, I understood, packed some pork and beans here. Cal-pack I understand, packed nothing but citrus fruit.

Q. You testified that in 1939, your purchase of cans was 440,000?

A. For use in our Tampa plant.

Q. You did not take into consideration your purchases at your Santa Rosa plant?

[fol. 633] A. No sir, they were separate. Understand if I had done that those figures would have been very much higher.

Q. Have you made any effort to ascertain what proportion of Cal-pack's entire operation is represented by its Tampa plant?

A. Yes sir.

Q. When and where did you make such inquiry?

A. Among other times and places on April 1st and 2nd, 1943, in New York, we inquired of Mr. Nugent and as I remember it, of others and the information was refused.

Q. And that was months after you filed the sworn pleas in this case setting up these defenses, was it not?

A. We filed our pleas when? I don't remember when we filed our pleas, but it very well could have been, when we actually made our inquiry.

Q. Did you ever ask Stokely or Cal-pack for that information?

A. No.

Q. Did the various representatives of the American Can Company whom you have named, as Mr. Slayton, Mr. Taylor and others, call upon Bruce's Juices frequently or just occasionally?

A. Just occasionally.

Q. How often would you estimate they called?

A. I should say Slayton called three or four times a year and Taylor, I don't know, my impression is that he called perhaps once a month.

Q. In addition you had numerous conversations by telephone to those gentlemen; did you not?

A. Oh, yes.

Q. And you testified that Mr. Slayton visited your plant three or four times a year?

A. That is the impression that is left with me, yes sir.

[fol. 634] Q. Mr. Slayton has testified in this case that he called on your place of business approximately 150 times, would you say that is incorrect?

A. Over what period?

Q. Over the period of 1937 through 1941?

A. 1941?

Q. Yes sir, 1937 through 1941, both inclusive?

A. An average of twice a month over that period, no sir, he did not call as frequently as that. In other words, for months at a time we did not see him.

Q. Did sales roadmen call at your place of business for the American Can Company to inspect or check your closing machines?

A. Yes sir, when we were in operation.

Q. How often did they call?

A. Practically daily.

Q. How often did he or an individual of similar qualifications call at Cal-pack's Tampa factory?

A. We have been informed by some of the employees of the American Can Company practically daily when they were in operation.

Q. Who were those employees that gave that information?

A. Joe Tolsom.

Q. Do you know how often Mr. Slayton, Mr. Taylor and others called at the Cal-pack Tampa factory?

A. No sir.

Q. Do you know how often they called at Stokely Tampa factory?

A. No sir.

Q. Mr. Bruce, over the period of years from 1937 through 194., here was considerable correspondence between your company and the American Can Company relating to your indebtedness for cans, was there not?

A. Yes sir.

[fol. 635] Q. There was also a number of telephone calls during that period?

A. Yes sir.

Q. And there were personal visits here and in New York also?

A. They visited us here and we visited them in New York. They visited us here probably twice a year and we visited them in New York oftener.

Q. That is in connection with the indebtedness?

A. Yes sir, in connection with our credit relations.

Q. I call your attention to the last item on each of the Exhibits 5, 7, and 9 marked Credit department expense?

A. Yes sir.

Q. Do you know how many times the American Can Company representative called upon the California Packing Corporation regarding its business?

A. No.

Q. I will ask you the same question as to Stokely Brothers.

A. No.

Q. Do you know what solicitation or efforts the American Can Company made in obtaining the execution of contracts with those companies?

A. No.

Q. As a matter of fact, Mr. Bruce, the price to you on both the 312 and the 314 can was each reduced during the time you were buying them, is that correct?

A. I would have to consult the records but if you have the records there I can point out when they were reduced.

Q. Do you recall if there was a reduction?

A. I do not follow what you mean.

Q. You know that you paid a set price for the cans per thousand?

A. Yes sir.

[fol. 636] Q. I ask you whether you know if you always paid that same price for the 314 cans that you bought or if there was not a reduction during the time you were using it?

A. Not on the plain tin portion of the can, on the 314.

Q. How about the 312 can?

A. I would have to look at the records to find out. There were reductions based on the—I cannot say reductions. I will have to say changes in price based on the base box price of the tin plate which was published annually. Whether there was other reductions or not, I would have to check the records.

Q. Irrespective of what it may have been based upon there was a change in price, downward?

A. I don't know whether it was downward or upward. It might have been both ways. I imagine at the beginning of 1938 it was upward because I believe the base box price of tin plate went up from 1937 to 1938, and I think it came down from 1938 to 1939 and stayed at that level, and stayed at that level through 1942. I am just*ing* quoting from memory, just observing from memory now.

Q. Mr. Bruce, you testified on direct examination that in your conferences with Mr. Nugent and Mr. Jenkins you discussed the fact that you wanted a trucking allowance on the cost of moving your cans from the American Can Company's Tampa factory to your plant?

A. Among other things, I discussed that.

Q. Was there ever an occasion during the time you had the contract with the American Can Company that they refused to deliver your cans by rail at your factory and on which they paid the switching charges?

A. Yes sir, I think there were, when we had some cans from out of Baltimore one time by rail, caused by the strike [fol. 637] or some other thing in Baltimore, I think it was

a strike of the steyadores in Baltimore, and they had to ship it down rail and we paid that.

Q. You paid what?

A. We paid some portion of the freight, I believe, I am not sure.

Q. (The question was read to the witness as follows:) Was there ever an occasion during the time that you had the contract with the American Can Company that they refused to deliver your cans by rail at your factory and on which they paid the switching charges?

A. You are speaking about deliveries from the local factory. That is the only occasion where the switching charges would be paid.

Q. That was the only occasion that you have described where there was a strike?

A. In reading this over you state switching charges, so I assume you mean from the Tampa factory to our factory.

Q. During the period of your contracts with the American Can Company did they ever refuse to deliver rail cars to your plant with the freight paid?

A. No sir, but I would like to explain that there were certain occasions.

Q. You just describe one?

A. I am not just sure about that one. You see we were buying individual service cans f.o.b. Baltimore, Maryland, water rate of freight delivered to Tampa and it seems to me we got in some rail cars and we were charged the rail rate and debited the carload water rate or something. I have just forgotten what it is; but if you are getting at the point, did they ever refuse to deliver from the Tampa factory to our cannery here in Tampa and refuse to pay the switching charges, as far as I remember, they did not.

[fol. 638] Q. You could have taken your cans by that method if you had desired?

A. Yes sir. I would like to explain that we discussed that with the Can Company and between us we decided that that was not a suitable way to take them, until I think the Fall of 1940 in one discussion with Mr. Slayton and other local officials here it was decided that it was a practical way to take them, and in the main we took them that way from then on.

Q. Was the fact that you had insufficient warehouse space to store rail cars a factor in reaching that decision?

A. Evidently not because we did not change our warehouse space and we took them in the Fall of 1940. The principal factor to be frank about it was that Mr. Slayton did not think it was feasible up until 1940, then he suggested that we try it, that he thought it was feasible.

Q. Did he state why he did not think it was feasible?

A. I do not remember.

Q. You have made a claim of something like $4800. I will ask you what the facts are about that?

A. The facts about that are that the cans were shipped to Stokely and Cal-pack here in Tampa and the American Can Company paid the switching charge and we drew our cans from the Canning Factory or from the dock, and we paid the trucking charge.

Q. But you could have gotten them by the same method that Stokely and Cal-pack used under your contract?

A. Evidently we could have because from the Fall of 1940, Slayton said let's go ahead with it, whereas before he said he did not think it was practical, and we found no difficulty after the Fall of 1940 in doing that.

Q. Mr. Bruce, do you know of your own knowledge whether any customer of the American Can Company who purchased less than $500,000 of cans were given a quantity discount?

[fol. 639] A. No.

Q. I believe you testified in your conversation in April 1940, with Mr. Nugent, and I believe with Mr. Jenkins in New York, you requested a discount on quantity?

A. I did on that occasion and some other occasions.

Q. Mr. Bruce, what was the date again of this three way telephone conversation that you have described?

A. On or before June 17th, 1940.

Q. You are positive it was not the 18th of June?

A. Well, I believe it was not the 18th of June because I have in my files a letter dated June 17th, in which I refer to some of the matters taken up in the telephone conversation, and that letter is dated June 17th, and so I say it was on or before that date.

Q. Mr. Bruce, I hand you what purports to be an original letter from you to Mr. Len. D. Jenkins, dated June 19th, 1940, and ask you if you wrote that letter?

A. Yes sir, I think so. I think I did, yes sir.

By Mr. Allison: The plaintiff offers the letter identified by the witness in evidence as Plaintiff's Exhibit G.

By Mr. Fowler: I have no objection on the ground that it is on cross-examination.

Thereupon the letter was admitted in evidence as Plaintiff's Exhibit G, and was read to the Court, which said exhibit is in words and figures as follows:

[fol. 640] PLAINTIFF'S EXHIBIT G

Bruces Juices, Inc.

Tampa, Florida

Cable Address "Brujuice"
Tampa, Florida
Code: Bentleys

Post Office
Box 2271

June 19, 1940.

Via Air Mail

Mr. Len D. Jenkins,
American Can Co., 230 Park Avenue, New York, New York.

DEAR LEN:

Confirming our telephone conversation this morning, we have an opportunity to get rid of all sizes of Bruce's Juices lithographed can, other than the 314, by packing them in Tomato Juice in our Tampa operations.

We urge you to make a detailed search of all such odd sized cans as are on American Can inventory at the present time and get them to Tampa forthwith so they may be used up and put out of the way.

We also look to you for an itemized inventory of all lids, citrus, tomato, and all other types.

Yours sincerely, (Signed) J. A. Bruce.

JAB:jh

Complainants' Ex. G. Oct. 11/43. R.F.J.

By Mr. Allison:

Q. Mr. Bruce, I hand you what purports to be an original letter on the letter head of Bruce's Juices, dated June 11th, 1940, addressed to the American Can Company, attention

Mr. L. D. Jenkins, and ask you if you wrote that letter and signed it?

A. Yes sir.

By Mr. Allison: If there is no objection the plaintiff offers this out of order at this time as Plaintiff's Exhibit H. [fol. 641] By Mr. Fowler: There is no objection. There being no objection thereto the said letter was admitted in evidence marked Plaintiff's Exhibit H, which said exhibit is in words and figures as follows:

PLAINTIFF'S EXHIBIT H

Bruce's Juices, Inc.

Tampa, Florida

June 11, 1940.

American Can Company, 230 Park Avenue, New York, N. Y.

Attention: Mr. L. D. Jenkins, Asst. to Gen. Mgr. of Sales

GENTLEMEN:

I am sorry that you could not see your way clear to get together with the Continental Can Company on certain matters which are of common information and cannot in any way be construed as being in restriant of trade.

Knowing this beverage can distribution better than anyone in the field, I wanted to give the two most important factors among suppliers, some pertinent information regarding it.

It can truly be called a beverage can because tinplate is what we are selling. I assume your sales are being made at the present time on a profitable basis, but if this merchandising scheme is to go on and grow like Topsy, uncontrolled, then I can readily see where the can manufacturing costs will be increased as the business grows. On the other hand, any well conducted operation of itself in this beverage field can so regulate its activities that the cost of cans for that individual operation should be decreasing instead of increasing. It is to protect this situation at some future date that I am writing this letter today.

I trust that this letter will be sufficient to treat our company, insofar as beverage can costs are concerned, independent of the general price level that may prevail for others, when you discover that the present policy which you

are following has complicated manufacturing conditions, and increased your costs, to a point where it will be necessary for you to increase your can costs to certain of your customers.

Yours very truly, Bruce's Juices, Inc. (Signed) J. A. Bruce.

JAB:ml
Plff. Ex. "H". Oct. 11/43. R.F.J.

[fol. 642] By Mr. Allison: I will furnish copies also of these.

Q. Mr. Bruce, do you know whether any Florida customers of the American Can Company used the 312 can in 1940, at the price of $9.68 f.o.b. Baltimore?

A. I do not know.

Q. You testified at some length regarding your discussions with Mr. Nugent and Mr. Jenkins and Mr. Sarver in April 1940, I believe?

A. Yes sir, I did.

Q. And you testified that you told them that you would not renew the notes unless some adjustment was made?

A. I did.

Q. Did you make that statement to Mr. Sarver?

A. I made it to all three of them.

Q. Were they together at the time in the same office?

A. At one time we were together and at other times we were not.

Q. And you then renewed the notes on which you were unwilling to pay any principal until the adjustment was made?

A. Subsequent to making the agreement with them, I did.

Q. Was there any time limit expressed?

A. No sir.

Q. These notes were approximately $114,000?

A. Yes sir.

Q. And they all bore 5 per cent interest?

A. Yes sir.

Q. And you were agreeable to continue paying the interest?

A. Yes sir, because, to explain that, they were agreeable to an adjustment being made on them and at the time the adjustment was made, the interest that I had paid would be taken into consideration in the adjustment.

[fol. 643] Q. Did you pay the interest?

A. I did up until the Spring of 1942, I think the date was May 25th, 1942, on approximately $26,000, and until November 30th or December 31st, 1942, on $75,000.

Q. Each of those notes during the period between April 1940 and the giving of the land note in each case were renewed several times?

A. Yes sir.

Q. Between April 1940 and March of 1942, did you have any conversation with Mr. Nugent regarding the adjustment?

A. I am not sure that I did. I can say definitely that I had no discussion with him regarding the amounts of the adjustment although I tried to reach him on two occasions, but he was reported as being unavailable and unable to talk with me. Whether I discussed the adjustments or not in my conversation, I do not remember at the moment but I am quite certain that I did.

Q. In talking to Mr. Sarver in April 1940, did you tell him what the adjustments you claimed covered?

A. Mr. Sarver knew.

Q. Did you tell him?

A. Probably, I did. I certainly discussed it with him and he knew what the adjustment was for.

Q. Did you discuss the trucking claim with Mr. Sarver?

A. Yes sir, I think I did.

Q. And you also discussed the claim for discrimination?

A. Yes sir.

Q. You are definite on that point?

A. Yes sir.

Q. Was that in his office or in Mr. Nugent's office?

A. I am not sure which.

Q. But you are positive it was on the occasion of that visit on your part to New York?

[fol. 644] A. Yes sir.

Q. On what basis did you arrive at the figures of $50,000 which you testified you think was a fair adjustment?

By Mr. Fowler: If the Court please, I will offer an objection to keep the record straight. That is the offer of compromise that we discussed. When we testified in New York all I did was to make the objection and the witnesses went ahead and answered the questions. I submit it is

unfair to ask a man why he arrived at a figure of compromise because it is a compromise proposition.

(After argument of counsel, the Court stated:)

By the Court: If you do not want to waive any right that you have just suppose you go on and let it come in.

By Mr. Fowler: Our position is that it is not relevant to the trial. I am sure that the Court will give it the weight that he thinks it is entitled to.

By the Court: If it is an offer to compromise I do not think it should come in. I do not think as far as Mr. Bruce is concerned it is very much evidence to say that I demand a $50,000 credit on here, without any explanation, but if it is a compromise, I do not think it should go in. I will sustain the objection.

By Mr. Allison:

Q. Did you ever demand any other or larger sum than the $50,000 that you testified on direct examination?

By Mr. Fowler: If the Court please if one is objectionable, the other is objectionable for the same reason because it is in the nature of a compromise.

[fol. 645] By the Court: I think he could answer that question.

Q. (The last question was read to the witness.)

A. I am not sure whether our filing suit in Federal Court in October 1942 for $657,000 damages is a demand, but if it is we did.

Q. But not prior to March 1942?

A. No, not prior to March 1942.

Q. Were you quoted a price on the 312 cans for your plant in Santa Rosa, Texas, by the American Can Company?

A. I would have to check my records to be sure on that. At the moment I do not remember any such quotation. I would like to explain that I was aware that I could purchase it for $9.68 subsequent to June 1940, f.o.b. Houston.

Q. Mr. Bruce, will you produce an original letter, dated November 23rd, 1937, addressed to yourself from A. H. Nugent?

A. We have never received such a letter and we have checked.

Q. Here is a copy of your acknowledgement dated December 8th, for your information. That is just a copy of the acknowledgement. That is not the original?

A. It seems to cover the basis. I have never had an original in connection with that agreement but it seems to cover pretty well just in glancing through it what the agreement was. We have not been able to find the original. These were all in the hands of Mr. Smalle, and he left for the Army in the Fall of 1940, and where he kept these contracts, I do not know.

By Mr. Allison: If there is no objection to the offer of the copy, out of order, the plaintiff offers in evidence, the copy of the letter dated November 23rd, 1937, addressed to Mr. J. Adams Bruce, President, Bruce's Juices, Incorporated, Tampa, Florida, and signed A. H. Nugent, and ask that it be marked Plaintiff's Exhibit I.

[fol. 646] By Mr. Fowler: With the explanation which we have made that we have not found the originals of these letters, if Mr. Allison produces it and says that it was sent to us, we are not offering any objection to it being put in evidence with that explanation. We would like the opportunity to refer to it later if it becomes important. We do not mean that we consider ourselves bound by its terms but simply that the plaintiff contends that they sent it to us.

Thereupon the said letter — marked Plaintiff's Exhibit I, and is hereto attached as a part hereof, in words and figures as follows:

PLAINTIFF'S EXHIBIT "I"

Oct. 11/43
R.F.J.

November 23, 1937.

Received Nov. 24, 1937. American Can Co., Credit Dept.

Mr. J. Adams Bruce, President,
Bruce's Juices, Inc., Tampa, Florida.

DEAR MR. BRUCE:

We shall confirm in this letter the understanding that was had at the Chatham Hotel on Sunday afternoon, November 21, in reference to can credit for your citrus pack in Florida and Texas during the 1937-38 season.

We will accept Bruce's Juices' 90-day 5% interest-bearing notes totaling $125,000., the interest to apply from the

dates of the notes. This credit may be used as you see fit, that is, if you prefer to use it at the beginning of your season and pay cash for the balance of the cans required, that will be satisfactory, or you may pay part cash and cover part of the cans with notes until the total amount of the paper has reached $125,000.

We also agreed to change your terms from net cash on receipt of invoice to prompt net cash with payment on Wednesday of each week covering the previous week's deliveries. Copies of invoices covering cans shipped from our Houston, Texas factory to your plant in the Rio Grande Valley will be sent to Mr. Slayton so that he may call on you each Wednesday morning and obtain settlement for the [fol. 647] cans shipped the previous week to both your factory at Tampa, Florida and your factory at Santa Rosa, Tex. At that time you may decide on what basis settlement is to be made.

It was agreed that the two notes we are now carrying totaling twenty-one thousand dollars odd, one of which was due November 1st and the other due December 1st, would be extended 90 days from these respective dates and considered a part of the $125,000. line of credit, also we would cover the present open account up to and including Saturday, November 20, with 90-day, 5% interest-bearing notes and that we would average the shipping dates and make three notes to cover the open account. We are preparing these notes and will send them along with the renewals of the two notes to Mr. Slayton so that he may submit them for your signature. After applying this credit there will be a balance of $70,344.83 on the $125,000. line.

You also inquired what would be necessary in case renewals were requested. We told you that on any renewals we would require bonded warehouse receipts as collateral. This would be figured on the basis of 70% of the market value at the time the warehouse receipts were taken.

Mr. Bruce, it was gratifying to me to know that you were so well pleased with this credit arrangement. We went the limit in working out this arrangement for you, and hope that it will prove to be mutually satisfactory.

Very truly yours, A. H. Nugent, General Manager of Sales.

ahn-T.

P. S. We put the new terms into effect on Monday, November 22.

cc: Messrs. J. J. Lynch, L. D. Jenkins, M. M. Slayton, I. W. Siekmann, A. W. Geier, J. M. Colas, J. H. Morrison.

By Mr. Allison:

Q. Mr. Bruce, I show you what purports to be a copy of an original letter from you to the American Can Company this December 8th, 1937, attention Mr. A. H. Nugent, and referring to the addressee's letter of November 23rd. Do you have a carbon copy of that letter in your files?

A. As I remember our files, we do not.

Q. Do you recall whether you wrote such a letter?

A. At the moment, I do not. As explained before, the filing and the care of these were directly under Mr. Smalle, who is gone away, but I would like to see the original letter.

[fol. 648] By Mr. Fowler: I will say with that explanation we have no objection to the Court letting it go in.

A. It is the sense of what should have been written and what the reply should have been, just from a quick glance at it.

By Mr. Allison: If the Court please, if there is no objection as to its being out of order, plaintiff would like to offer in evidence the copy of the letter dated December 8th, 1937, as Exhibit J, with the understanding that we will search our files and endeavor to produce the original of which this purports to be a copy.

By Mr. Fowler: With the explanation we have made and the explanation Mr. Allison had made, we have no objection.

Thereupon the same was marked as Plaintiff's Exhibit J and is herewith transmitted as a part hereof, in words and figures as follows:

PLAINTIFF'S EXHIBIT J

Bruce's Juices, Inc., P. O. Box 2271, Tampa, Florida

December 8, 1937.

American Can Company, 230 Park Avenue, New York, N. Y.

Attention: Mr. A. H. Nugent, General Manager of Sales

DEAR MR. NUGENT:

I have read your letter of November 23rd covering the matter discussed on November 21st. Your letter appears to follow in detail the arrangement we discussed at that time.

We have had a visit this week from Mr. Slayton and Mr. Geier, and notes have been issued on all November and preceding invoices in line with the understanding reached. [fol. 649] I was glad to have the opportunity of seeing you for a short time in New York and regret that my arrangements were such that we were unable to get together for a greater length of time.

Yours sincerely, (Signed) J. Adams Bruce.

JAB: ml.

Pltf. Ex. Oct. 11, 1943, R. F. J. Received Dec. 13, 1937, American Can Co., Credit Dept.

Redirect examination.

By Mr. Cody Fowler:

Q. Mr. Bruce, I hand you letter introduced in evidence as the Plaintiff's Exhibit G, and ask you if the conversation referred to in that letter was the conversation you had with Mr. Nugent and Mr. Jenkins regarding which you have previously testified?

A. I don't believe it was. I find in my files a letter dated June 17th, a copy of letter, that I wrote to Leo Jenkins dated June 17th, in which I referred to matters taken up in the telephone conversation which has been referred to here as the three-way conversation. I also demanded in that conversation that the cost of the 308, the 309, the 312, and the 314 be given to me and we have in our files a letter dated June 18th with such a list attached, and also have

copies of letters dated June 19th and June 21st, which are entered in evidence.

Q. Mr. Bruce, from your knowledge of the particular business which you are in and your competitors, state whether or not generally the same size of cans are used for the canning of vegetable and fruit juices by the California Packing Corporation as those used by Stokely Brothers, Hawaiian Pineapple Company, and Libby, McNeil & Libby, The Great Atlantic & Pacific Tea Company, and Morgan & Company for the grocery trade, as those used by Bruce's Juices, just the size?

[fol. 650] A. Yes sir.

Q. State whether or not those corporations sold juice, both vegetable and citrus, in competition with you in the marked in the various states?

A. Yes sir.

By Mr. Fowler: We will ask Mr. Nugent to take the stand, please.

By Mr. Allison: I do not understand. Are you calling him as your witness?

By Mr. Fowler: This is a pre-trial conference. I am just calling him as a witness. We are entitled to ask him on further cross-examination on these Exhibits introduced in New York.

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Thereupon the defendant, further to maintain the issues on its behalf, then and there produced and caused to be sworn as a witness, A. H. NUGENT, who testified as follows:

Direct examination.

By Mr. Fowler:

(This may be considered as cross-examination in view of the above remarks.)

Q. Mr. Nugent, state again your name and your position with the American Can Company?

A. A. H. Nugent, I am general manager of sales packers' cans.

Q. You are the same Mr. Nugent who testified in New York in a hearing in this suit on April 1st and 2nd, are you not, 1943?

A. Yes sir.

Q. Mr. Nugent, I believe you testified that there is no [fol. 651] difference in the contracts between the A, B, and C customers of the American Can Company, is that correct?

A. Packers can contracts.

Q. That is packers can contracts?

A. That is correct.

Q. Relative to the contract which Mr. Bruce had, which is called sanitary cans?

A. Yes sir, Exhibits 3 to 28-A.

Q. Mr. Nugent, the American Can Company sells to a great many small canners in the East, particularly New Jersey and Maryland, in *in* through there, out of the Baltimore office?

A. Yes sir, we have a number of accounts in that territory.

Q. A great deal more than you have in this territory down in Florida?

A. You are speaking now of small ones?

Q. Of small cans? Of those who buy a small number of cans from you?

A. Yes sir, that would be true.

Q. Generally, how many customers have you in Florida, approximately?

A. That would be purely a guess. I would like to refer to the records and find out if you want it definitely.

Q. If you cannot tell us approximately, which I believe you can?

A. I would say about somewhere in the neighborhood of 25 I do not want to make that a definite statement. I will be glad to check the records and give it to you accurately.

Q. You could do that out of this office out here?

A. Yes sir.

Q. If it is not approximately correct, will you tell us tomorrow?

[fol. 652] A. Yes sir.

Q. Most of these are rather substantial purchases of cans?

A. No, I would not say most of them. I would say quite a number of them are large purchases of packers cans.

Q. Then you have only a few that you would say are small purchasers in Florida?

A. This is merely guessing and I would prefer to refer to the records. I do not know. I have all of the United

State and I cannot remember the number of customers in any one state.

Q. You can give us that information on you think in the morning?

A. Yes sir.

Q. Now, I will ask you if you do not know generally that you have a great number of those who purchase a small number of cans from you in many of the states like the tomato juice area of Maryland and Delaware, if there are not a large number of small canners up there?

A. You are speaking of the number and not the number of the American Can Company customers.

Q. I am talking about the number of American Can Company customers who are small canners?

A. We do not have a great many small customers in that area. There — a number of small ones in that area but the percentage of the total that we have in that area is not very large.

Q. Don't you sell to a large number of canners for oysters on the Eastern shore of Maryland?

A. No sir.

Q. You do not have any?

A. No sir.

Q. I will ask you if you do not have a much greater number in percentage of those who pack in small quantities in the East than you have in Florida?

[fol. 653] A. Taking all of the Eastern shore now?

Q. Yes.

A. Oh, yes, surely. I want to add a little something to that. You are talking about all products, not on a specific product?

Q. All products, not any specific product?

A. Yes sir.

Q. To whom do you pay commissions for making sales?

A. In some sections of the United States, we employ a broker to handle our sales, that is to make contracts and sell cans to those canners. Usually that is in a territory where there are a number of small canners.

Q. Can you give an example of some territory that uses that system, where you use that system?

A. I would say that in the Ozarks where there are a very great many very small canners, and it would be very expensive to service them ourselves, and we do not extend the credit to those accounts, and this broker handles for us not

only the sale of the cans but he also handles the credit for us.

Q. You have several large territories where you use that same system?

A. No sir, we do not.

Q. Just the one?

A. We have a very small one in the East.

Q. You do not have one in Kansas City?

A. That is the one I am talking about. That is the broker that I mean that handles the canners in the Ozarks, is the one that is located in Kansas City.

Q. Where is the one that handles the canners in the East that you refer to?

A. Right near Baltimore, I don't think of the name of the town now.

[fol. 654] Q. It is in Maryland?

A. Yes sir.

Q. The same general situation prevails in his territory as prevails in the Ozarks?

A. Generally speaking; not exactly.

Q. You do service a good many of them around Baltimore yourself, do you not?

A. In what respect?

Q. Do the work that you said the broker did in the Ozarks?

A. I will put it this way: Most of them we handle ourselves in the East, that we have.

Q. Of your customers, what percentage would you say purchased less than $100,000 worth of cans a year, take the year 1942?

A. I cannot answer that without referring to my records. I cannot keep that in my mind.

Q. Could you give us an approximation?

A. No sir, I would rather not make a guess. I will be happy to furnish it to you.

Q. You cannot give us any of these things?

A. No sir, I would not want to make a guess.

Q. What is the smallest amount which you will sell a customer, do you have a rule on that?

A. We have a rule that we won't—I will say our general policy is that we are not to sell less than two carloads of cans to a canner, unless it is an open order: In excess of two cars, the salesmen may cover that account with a contract. That is the general rule. But if there are possibilities of this account, of any account growing, and there is enough information brought into the office, either the district

officers or the officers in New York that there is a possibility or an outlook, or the outlook is such that this particular account has possibilities of growing, then we would not hold the salesmen to that policy.

[fol. 655] Q. But anybody that wanted to come and buy as much as two cars a year, could just come and buy?

A. I won't say anyone but I will say that we sell cans on what we call open account, that is to canners who do not have contracts, and we also sell cans to canners who do have contracts.

Q. When your salesmen are out calling on people who might be customers for cans, they call on the little ones and big ones alike?

A. You mean in the regular business?

A. Yes.

A. It does not work out just that way. In certain territories we have a great number of small accounts. In other territories we may have mostly large customers. But the salesmen in any particular territory, he calls on his customers at intervals. There might be times when he would call on a smaller canner more often when that canner needs more assistance than usually is required by the large canners.

Q. When he is out trying to sell cans the salesman tries to sell all of the cans he can. He does not pass up a plant because it is a little one?

A. No sir, we are after business at all times.

Q. You do not use the commission method of selling in Florida, do you?

A. No sir, we do not.

Q. In other words, nobody gets any commission on the cans sold in Tampa?

A. No.

Q. You have had the general supervision of getting Mr. Bruce's contract renewed each period when the old contract was about to run out, have you not?

A. In this period from June 19th, 1936 to 1942?

[fol. 656] Q. Yes sir.

A. That is correct. That would be from September 1936 to December 31st, 1942.

Q. He generally signed a contract and that assured the purchase of his cans for that period of time; you only had to make a call ever so often when the contract was running out, to get the contract?

A. Yes sir, as the contract was running out we would make an effort to get it renewed.

Q. And did you generally make a trip to Tampa to do that?

A. I made one trip to Tampa.

Q. Mr. Nugent, in handling Mr. Bruce's account in Tampa, it was handled the same as the California Packing Company and Stokely Brothers, was it not?

A. It was handled the same.

Q. In the same general way?

A. Yes sir, I would say that would be true.

Q. Do you know whether or not it is not true that Mr. Bruce 'phoned or sent in his orders by letter rather than to have *to have* the salesmen call on him?

A. No sir, I am not familiar with that, because I do not handle the order or receive the orders or have anything to do with that portion of the business.

Q. You just do not know either way on that point?

A. No sir, I would not know definitely.

Q. Do you know if it is not true in Tampa that Stokely Brothers, California Packing, and Bruce, all used practically the same method of closing machines?

A. I would not know that answer. That would have to come from someone else.

Q. You know, do you not, that the same can is sold to the three companies?

[fol. 657] A. The same type of can.

Q. The same sized can in general?

A. Other than this small juice can.

Q. Yes, not counting the small juice can, the grocery trade cans?

A. The grocery trade cans are of the same type as used by Bruce's Juices.

Q. These cans are kept in stock over there and who ever sends in gets them; they are not made for any one customer at your plant?

A. What we call our standard plain cans are kept in stock for any customer that wants to use them.

Q. And from that general stock the orders of Bruce's Juices, California Packing and Stokely Brothers are all filled here in Tampa?

A. Yes sir, the plain cans that we put in stock for the use of our customers in advance of any packing season are there for any customer's requirements.

Q. You build up a big stock and have them there when the orders come in?

A. We have a fair quantity in our storage warehouse for that purpose. I do not know what you mean by a big stock.

Q. The grocery trade can is not a special order can; it is just a stock can?

A. You are referring now to a can as a group?

Q. Yes sir.

A. That is correct.

Q. Now, Mr. Nugent, I call your attention to Defendant's Exhibit F-15, which as I recall it is the No. 1 can referred to in your contract, is not that correct?

A. Yes sir, this can is known as our standard No. 1, 2 and 11/16 inches in diameter by 4 inches high.

[fol. 658] Q. I hand you a can that is marked Defendant's Exhibit — the 202 by 214 can, and of the exhibits introduced here, I will ask you if that can is not most nearly similar to the No. 1 can?

By Mr. Allison: If the Court please, I object to the question unless the form of the question or unless some comparison standard is laid down.

By the Court: If the witness can answer it, let him go ahead and answer it.

By the Witness:

A. If you are referring to that portion of the contract which speaks of making a price on a can: If the buyer shall require during the term of this contract cans of a size other than those covered by this contract for use in the territory covered by this contract, the prices of such cans shall be fixed by taking from this contract the prices prevailing at the time. (The witness reading from the contract.)

By Mr. Fowler:

Q. I will ask you if the 202 by 314 can is not—I will ask you if the No. 1 can is not most nearly similar to the 314 can than it is to the other cans that are introduced in evidence?

A. Yes sir, that would be true.

Q. And it is also more nearly similar to the No. 1 can than it is to the No. 2 can, the No. 2½ can, and the can designated as 404 by 700, and the No. 10 can?

A. Yes sir.

Q. Those are all larger cans, are they not?

A. Yes sir, those are all larger than the standard No. 1.

Q. That No. 1 can is also more nearly similar to the other cans introduced in evidence, is it not, as compared to the other cans listed in your contract?

[fol. 639] A. Yes sir, I would say so.

Q. The 202 by 312 is only slightly smaller than the 202 by 314, is not that correct?

A. That is correct.

Q. You rendered the same type of service to Bruce's Juices in connection with handling his account in 1939 as you did in 1940, did you not?

A. Yes sir. I might say here that we rendered more service to Bruce's Juices' account than anyone I can think of in the whole United States or any place else.

Q. You rendered the same service in 1939 as you did in 1940?

A. Yes sir.

Q. These conventions that you have got charged in your Exhibit here is a big item. Is it not true that the larger canning companies attend the conventions more than the little ones?

A. I don't know just what you mean by that.

Q. You have got for a total of twelve months' period the small canners for 1941 charged with $78,751.56, while you have only got for the same period the amount charged to Group A customers of $2,845.27, and the Group B customers, $6,648.36. I will ask you if it is not a matter of fact that a good deal more of the A and B customers attend and take an active part in these conventions than do the percentage of C customers?

A. No sir, not on the basis of dollars and cents of sales. We have only a few large customers and there may be one or two representatives from each of these companies attend the convention, but usually there is at least one representative from each of the small companies regardless of the size.

Q. What are these expenses that make up this $81,000, if you know?

[fol. 660] A. Most of them in that year are, I am quite sure—I would want to check to make sure—are for the National Canners Convention in Chicago in that year.

Q. What items are included in that; are refreshments included?

A. I don't know. I just don't know what items go in to make up this total of expense.

Q. Do you personally know what items go into these other figures, listing the separation of expenses at the left?

A. No sir. This report is compiled by our auditing department and from information that they received from various sources.

Q. And according to some policy which they have of applying it; I mean some policy to decide whether one item ought to be charged under either of these heads or to none of them, and also which Group to be charged?

A. Yes sir, they have what is known as accounts to which each expense should be charged.

Q. For example, do you know what they included in this warehouse expense charge No. 22?

A. No sir, I would not want to answer that because I am not familiar with the operation of the auditing department.

Q. Take this very large item which to the Canners is charged the sum of $271,848.05, while only $27,428.89 is charged to the A Group, known as laboratory assistance; do you know what is included in laboratory assistance?

A. I know what laboratory assistance is but I do not know how the auditing department keeps a record of it. They have their account numbers to which they charge up their expense covering services rendered to all our customers.

[fol. 661] Q. Do you know whether that laboratory expense includes work in the laboratory of the customers or the laboratory of the American Can Company?

A. I don't know definitely. It is certain work that we do in our own laboratory for our own customers and we also do work out in the field.

Q. Do you know what those items are?

A. No sir.

Q. Are you familiar with this credit department expense No. 51?

A. No sir, I am not familiar with how they distribute that expense. That is done by the auditing department.

By Mr. Allison:

Q. Mr. Nugent, how long have you been with the American Can Company?

A. It will be 37 years in April.

Q. How long have you been in your present position?

A. Since September 1936.

Q. You were in that position when Exhibits 5 to 9 were compiled?

A. Yes sir.

Q. Do you know whether in compiling these statistics any attempt was made to keep a separate account of the items to any one customer or any one account?

A. No.

Q. In other words, they were handled by these Groups as identified in the exhibits?

A. That is correct.

Q. How many term contracts, similar to Exhibits 3 to 28-A in the Defendant's Exhibits 3 to 28-A, inclusive, approximately, did the American Can Company have during the years 1937 through 1941?

(fol. 662) A. On the average?

Q. Yes sir, I would say approximately.

A. I would say in the neighborhood of 1400.

Q. That included the defendant in this case, Bruce's Juices?

A. Yes sir.

Q. You refer to the convention in Chicago in 1941, is that correct?

A. Yes sir 1941.

Q. Did your company have an exhibit at that convention?

A. Yes sir, we had an exhibit but it did not include machinery of any kind.

Q. Did you usually have an exhibit at those conventions?

A. Yes sir.

Q. Is the cost of that included in the item, or do you know?

A. No sir, I would not know that Mr. Allison.

Q. I note from Exhibit 2, the sales roadmen's expense book that in describing that account reference is made to conventions and cannery schools. Do you know what a cannery school is?

A. Yes sir.

Q. On Page 30, what is it?

A. Sometimes during the season or prior to the active canning season, we hold what is called a closing machine service school and we extend invitations to our customers in a certain locality within a range of may be 150 or 200 miles to send their men if they so desire who will look after their closing machines or try to service their closing

machines during the season and get instructions in regard to the operation of our various types of closing machines. [fol. 663] Q. You also referred to laboratory expense. Does your company do experimental and investigative work on types of containers for various food products?

A. Yes sir, we are doing that type of work all of the time.

Q. Does that relate to changes or improvements in the canning processes?

A. Yes sir, in the cans themselves and in the food products. We try to improve the quality and also we have agriculture men to go out and test the soil to ascertain if there is any bacteria in there that may be harmful, such as blight and various fungi, to assist the grower so he will get better raw material to can.

Q. Did the shortage of tin resulting from the war create the necessity for laboratory work on containers?

A. Yes sir, a great deal of work.

Q. Are those various things comprehended under the heading Laboratory Assistants?

A. Yes sir, those would all come under laboratory assistants, and I might add that we are at all times trying to anticipate the future, and experiment with various food products in advance which might be an improvement over the canned food that is being packed at the time and this is service for the benefit of our customers.

Q. Do you handle in your laboratory complaints or difficulties that your individual cannery customers experience?

A. Yes sir, that service is available to all of our customers from the smallest one to the largest one, and when a customer reports that he is having difficulty with a certain product and ask for our technical service, whether it is laboratory or agricultural department or any other department of the company that service of the company is available to him.

[fol. 664] Q. That expense is necessary and considered an addition to the price of cans?

A. Yes sir, that must be taken into consideration.

Q. For example and by way of illustration, Mr. Nugent, there are types of food which cannot be canned in the same containers such as corn and tomato juice, in that one has a chemical reaction and the other does not, is not that correct?

A. Yes sir.

Q. And that calls for research from time to time, does it not?

A. Yes sir, it does.

Q. Mr. Nugent, what is your experience with closing machines service to your larger customers as compared with the small customers who we will call non discount customers?

A. Those customers whom we consider our larger customers, they usually have available in their own company technical departments; they have certain types of laboratories and they have their mechanical men, as good mechanics as we have, and they can service our closing machines; they can change a machine over and they are fully equipped usually to render approximately the service that we could render; so that if it requires much less service from us as far as the larger customer is concerned than it does for the smaller customer.

Q. That was true in the years 1937 through 1941?

A. Yes sir.

Recross-examination.

By Mr. Fowler:

Q. The smaller the particular plant ordinarily the more canning difficulties it has?

A. No sir, that is not always true but I would say generally that it was true.

Q. Any improvements that you make, all of your customers get the benefit of it?

[fol. 665] A. They get the benefit of it either directly or indirectly.

Q. What kind of an exhibit did you have up in Chicago in 1941?

A. We were showing some pictures; we had a little miniature store, a little miniature laboratory and kitchen, up around the wall, and then we had a tape that was running all of the time which gave information of a certain kind to those who came in to what we called our booth.

Q. What would you say that exhibit cost the American Can Company to run it during the convention?

A. I would not want to make a guess. I don't know exactly. I could no doubt get that information. I do not show off hand. It would be purely a wild guess on my part.

Q. Would it be $10,000?

A. Oh, no.

Q. Five, may be; what would it cost to take the exhibit over there?

A. As far as the exhibit was concerned it was not a big item.

Q. These convention expenses include all of the expenses there, if you gave any food or drink or anything of that nature, that is included there?

A. If we served a drink on the premises such as orange juice or a drink of that kind, naturally that would be contributed to those attending, which we did not.

Q. That would be included in your items for expense for 1941?

A. Yes sir, anything like that that had been done.

Q. What other things are included in that convention expense?

A. I don't know all of them. I might know some of them.

[fol. 666] Q. Name the few that you do know?

A. I know the expense of railroad fare and food for our own men and housing for our own men and some entertainment to our customers.

Q. How many men did you send over?

A. I do not recall.

Q. Ten, twelve or four or five?

A. Well, I would hate to guess on that because I don't remember just how many.

Q. You were there, were you not?

A. Yes sir, I was.

Q. You must know approximately how many men were there?

A. The reason why I do not know exactly is because that was held in Chicago and one of my men from the Chicago office might drop in on the convention or more than one.

Q. Give us an idea?

A. That is purely a guess. I would say may be fifty of our men.

Q. That includes your Chicago office group?

A. As I stated it should include the Chicago office, yes sir.

Q. How many would you say went there by rail?

A. That is very difficult to guess. I do not believe I could answer that question. I do not like to guess.

Redirect examination.

By Mr. Allison:

Q. Mr. Nugent, there is a State Canner's Association in Florida, is there not?

A. Yes sir.

Q. Is not that true in most of the states, do they have such an association?

[fol. 667] A. Yes sir, I would say most of them.

Q. Do they have State Conventions usually?

A. Yes sir.

Q. Is the American Can Company represented at those conventions?

A. Yes sir.

Q. And that expense is included in the item of conventions?

A. Yes sir.

Recross-examination.

By Mr. Fowler:

Q. Do you know whether Bruce's Juices is a member of any of the Florida Canners Association?

A. No sir, I would not know that.

(Thereupon adjournment was had until October 10th, 1943, at 10 o'clock A. M., at which time the hearing was duly reconvened and the following further proceeding were had:)

Thereupon the Defendant further to maintain the issues on its behalf then and there produced and caused to be sworn as a witness M. M. Slayton, who testified as follows:

Redirect examination.

Mr. Fowler:

Q. Please state your name for the benefit of the record.

A. M. M. Slayton.

Q. What is your official position with the American Can Co.?

A. District Sales Manager Southeast District.

Q. How long have you been connected with the American Can Co.?

A. About eight years, between seven and eight years.

Q. What position did you hold before coming to Tampa?

[fol. 668] A. Previous to that I was with the American Can Co., previous to coming to Florida I was with the American Can Co. and they sent me down here in 1922.

Q. Then you have been with the Company a good deal longer than eight years?

A. I got into the canning business and left the canning Company and then came back with them in 1934.

Q. You are the Mr. Slayton who previously testified in this case?

A. Yes sir.

Q. And you were of course, sworn at that time?

A. Yes sir.

Q. Mr. Slayton, what are closing machines.

A. Closing machines are machines used for sealing tops or bottoms on cans.

Q. How do they operate with regard to cans, how does that operation generally take place?

A. The type of closing machines that we have to close cans are either semi-automatic or what we call automatic. The tops are fitted into the machine automatically, the cans coming in at one end of the machine and the tops from another end of the machine they meet and are put together in what we call double seam, the flange on the can and flange on the top are rolled into a double seam.

Q. Under what arrangement are these closing machines placed in canneries?

A. By lease.

Q. Owned by the American Can Co.?

A. Yes sir.

Q. Does the California Packing Corporation lease can closing machines from the American Can Co.? To be used in its canning plant here?

[fol. 669] A. Yes sir.

Q. How many closing machines did the California Packing Corp. lease from the American Can Co. for its Tampa Plant in the year 1941?

A. Our records, of course, in this section of the country are based on the season and not the calendar year; in other words for the 1940-41 season the California Packing Corp. had three principal vacuumized units, three extra sets of change parts for the pre-vacuumized units, two closing

machines with three extra sets of change parts and three vacuum pumps.

Q. How many machines did Bruce's Juices lease from the American Can Co. and have in its Plant for the same season?

A. I don't have that record with me.

Q. Has the Manager—this Can Plant, The American Can Co., what is your opinion how they compared?

A. There is a great many ways of comparing closing machines. We might take as a sample one type of machine that we have for can 400, would operate anywhere from 50 to 200 cans per minute. One cannery may operate two shifts per day straight through the season and other one might operate every machine for a short period of time during the season.

Q. Do you know approximately how many machines Bruce's Juices had during that season?

A. No sir. I would not know without a record.

Q. How did the sales roadman of the American Can Co. from the Tampa Plant service the California Packing Co.?

A. The same as they serviced every other customer. Visits were made at frequent intervals.

Q. What was the dollar volume of cans that was put through the closing machines of the California Packing Corp. in the same season—1940-1941.

A. I don't know.

[fol. 670] Mr. Allison: To which question and the similar line of inquiry the Plaintiff objects for the following reasons:

1. It has no bearing on the issues raised by the Defendant's pleas.

2. It has no bearing upon the question of any discrimination in price, whether they bought more or less.

The Court: I think he answered and said he did not know.

Q. What has the dollar volume of sales of cans for the Tampa Plant of the California Packing Corp. during the year 1941?

Mr. Allison: The same objection.

The Court: I sustain the objection. I don't think that is a proper question.

Q. Then how did the dollar volume of sales of the California Packing Corp. for the season 1940-41 compare to the dollar volume of sales of Bruce's Juices?

Mr. Allison: To which question the same objection is made, on the following grounds:

1. The contract in evidence which is the same form made by the Plaintiff with this Defendant shows that the entire purchase of customer packers cans under that type of contract were to be combined in ascertaining the quantity discount and therefore this question is immaterial, or it relates only to one plant of an undetermined number of plants of one purchaser, and there is no showing how many contracts might have been in existence with such a customer.

The Court: I will sustain the objection.

[fol. 671] Q. Mr. Slayton, when were you first advised of the price of the 312 can, for the plain tin portion thereof, that it was $9.68?

A. I have no records with me as to the exact date.

Q. Would you know about approximately when that was?

A. I would not want to say without records.

Q. You are in charge of this Plant here and have been handling all this business. Could you not tell us approximately when you heard about this price?

A. I have about fifty customers in the Southeastern District and my time cannot be spent with one individually.

Mr. Allison: The Plaintiff objects to the line of questioning because the witness is here under subpoena duces tecum requiring him to produce information only regarding the number of closing machines in the California Packing Corp. Plant.

Mr. Fowler: There is nothing said that there would be no questions asked him except what might be referred to in the subpoena duces tecum.

Mr. Allison: I object to argumentative questions of the witness when he has stated they are based on records that he does not have with him.

Mr. Fowler: The man here is in charge of the Plant of the American Can Co. and he must have some idea. If he does not know anything about it he can say so.

The Court: I think he answered and said he did not know.

[fol. 672] Mr. Fowler: I asked him to give his idea on the question.

(Last question was read to the witness.)

The Court: You can answer the question if you can. I do not think you have answered it yet.

A. I have no records with me and I do not know.

Q. You just do not know when you heard about it?

A. That is right.

Q. You did know about it on June 18th when this letter was sent out of your office, this exhibit, did you not, June 18, 1940?

A. I probably did.

Q. You do not know how much before that you had heard it.

A. No sir.

Q. You might have just heard it that day?

A. That is correct.

Q. Mr. Slayton, I call your attention to two letters both of which have been introduced in evidence, the first one as Defendants Exhibit F-13 being a letter from the American Can Co. by one Walter T. Taylor June 19, 1940 to Bruce's Juices: I called that to your attention; and likewise called your attention to a letter introduced in evidence as Defendant's Exhibit F-14 from the American Can Co., Walter T. Taylor, to Bruce's Juices, Inc. dated June 21, 1940. In both of these letters, in the letter of the 19th, so that the court may understand the question, it states "In accordance with your Contract—describing the Contract in question—I quote you on the 202 x 312 a price of $9.68".

And the letter of the 21st is "in accordance with this contract" they quote the 202 x 309 at $9.80 as against the larger can.

[fol. 673] Now Mr. Slayton, I call your attention to paragraph two of section four of your contract, this paragraph of the Contract saying (whereupon Counsel read the paragraph of the Contract).

Mr. Slayton, in view of this paragraph of that Contract will you please explain how you quoted in accordance with the terms of the Contract the 309, the smaller can, at $9.80 and the 312, the larger can, at $9.68, the 312 being this can and the 309 being this can (indicating exhibits on the desk):

Mr. Allison: If the Court please, I do not believe the predicate is laid to show that this witness is acquainted with fixing the prices.

The Court: He can answer the question if he can.

A. The selling price is furnished us from the general office in New York.

Q. You have no explanation as to why that price should be fixed?

A. No, sir, other than as mentioned in the Contract.

Q. Would you say that that was in accordance with the terms of the Contract?

A. Yes sir.

Q. Would you say it was?

A. Yes sir.

Q. The 312 can that is listed at the cheaper price, is the larger of these two cans, is it not?

A. Correct.

Q. The No. 1 can is more nearly similar to the 312 can than it is to the 309 can, is it not?

A. That is correct.

Q. Then the 312 is more nearly similar to the No. 1 can than it is to the other cans mentioned in the Contract?

[fol. 674] A. That is correct. I have nothing to do with the fixing of the prices. All that information comes from our general office in New York.

Q. And you have no information why it was done at all?

A. That is correct.

Q. On what basis do you say the prices were right?

A. Taking into consideration all of the items mentioned in the contract.

Q. What are these items that were taken into consideration in fixing this price?

A. They are listed there. I just do not recall all of the items listed.

Q. I hand you the Contract and ask you?

A. I have explained before that I have nothing to do whatsoever with the pricing of cans. That comes from our General Office in New York.

Q. As a matter of fact, you do not know what caused them to make that change, if any?

A. I am quite confident from the policy of the Company that the items mentioned in the Contract are taken into consideration.

Q. And you think they are right because they came from New York and not on any other basis that you can give us here?

A. That is correct.

Q. I call your attention to a letter signed by you as local Sales Manager of The American Can Co. to Bruce's Juices, dated Feb. 4, 1938 and which is Defendant's Exhibit F-17, and the only paragraphs that I wish to call your attention as being pertinent to this question, are the third paragraph and the fifth paragraph, and point out to you that in that letter you quoted the 202 x 312 can as 30¢ higher than the 202 x 309. That is correct, is it not?

A. If that is the figure used in that letter.

[fol. 675] Q. I will ask you if that is not correct (whereupon the last question was read to the witness): The question is, if in that letter, you did not quote the 312 can at 30¢ higher than the 309?

A. That is correct and it includes the lithograph differentials.

Q. The lithographing differentials—those were the same, were they not?

A. That is hard to tell. I don't know how many colors there were.

Q. The lithographing differentials as quoted in your letter were the same?

A. Let me see that again (the letter was handed to the witness). That is correct.

Q. As a matter of fact, up until this last price on the 312 can, the 309 had always been priced cheaper than the 312, had it not?

A. I do not recall that.

Q. You would not say that is not true, would you?

A. No sir.

Q. The nearest competitor of the American Can Co. or the nearest plant of a competitor of the American Can Co., that is, the plant of the Continental Can Co. is located in Tampa, is it not?

A. Correct.

Q. I hand you, Mr. Slayton, an invoice dated Jan. 11, 1939 from the American Can Co. to Bruce's Juices, and I will have that marked Defendant's Exhibit F-18; and another invoice of the American Can Co. to Bruce's Juices dated Jan. 19, 1939 and ask that it be marked Defendant's Exhibit F-19 and I will ask that these two exhibits be introduced in

evidence. They are invoices to Bruce's Juices, are they not? From the American Can Co., both of them?

[fol. 676] A. Yes sir.

(Thereupon Defendant's Exhibits F-18 and F-19 were admitted in evidence without objection), which exhibits are in words and figures as follows:

DEFENDANT'S EXHIBIT No. F-18

American Can Company

230 Park Avenue

New York

Date Jan. 11, 1939.

Sold to: Bruce's Juices, Inc., Tampa, Fla.
Terms: Prompt Net Cash.
F.O.B. Baltimore, Md., freight equalized with Tampa at carload water rate of freight.
Shipped to Same, from Tampa, Fla.
No. 41-A San #184. Order 22 P S. Contract 947-A. Customer's Order #2884. Via Their truck.

| Quantity | Description | Price | Amount |
|---|---|---|---|
| 24000 | #202x312 San Litho Cans "Bruce's Juices" (no contents clause) | 12.46 M | 299.04 |
| 24000 | #202 San Litho. Ends "GFJ Sweetened, 6 Fl. Oz" | 18 ea. | 7.20 |
| | 40 Tote Boxes (600 ea.) | | 306.24 |
| | 96 #202 Canco Tubes | | |

New York. O.K. Merkle. Extensions G. P. P. Entered Cans. Paid AD 41 D.T #297.

[Stamp:] Received Jan. 13, 1938. Bruce's Juices Inc.

All claims for defects or shortage must be presented within thirty day from receipt of shipment. Goods returned without our authority are at shipper's risk.

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[fol. 677] DEFENDANT'S EXHIBIT No. F-19

American Can Company

230 Park Avenue

New York

Date Jan. 19, 1939.

Sold to: Bruce's Juices, Inc., Tampa, Fla.
Terms: Prompt Net Cash.

F.O.B. Baltimore, Md., freight equalized with Tampa at carload water rate of freight.

Shipped to Same, Tampa Factory.

No. 41-A San #333. Order 22 P. S. Contract 947-A. Customer's Order #3557, 3559, 3558. New York. Via Their Truck.

| Quantity | Description | Price | Amount |
|---|---|---|---|
| 25796 | #202x314 San Cans Litho "Bruce's Juices" | 12.64 M | 326.06 |
| 25796 | #202 San Ends Litho. "OJ Sweetened, 6 Fl. Oz." | | |
| 158356 | #202x314 San Cans Litho "Bruce's Juices" | 12.54 M | 1985.78 |
| 158309 | #202 San Ends Litho "GFJ Sweetened, 6 Fl. Oz." | | |
| 306 | Tote Boxes (600 ea.) | 18 ea. | 55.08 |
| 1 | Tote Box (552 ea.) | 18 ea. | .18 |
| 738 | #202 Canco Tubes | | |
| | (48 GFJ Ends short—to be adjusted later) | | 2367.10 |

D T #578, 629, 607, 606, 590

[Stamp:] Received Jan. 21, 1938. Bruce's Juices, Inc.

All claims for defects or shortage must be presented within thirty days from receipt of shipment. Goods Returned without our authority are at shipper's risk.

Q. In these invoices, Mr. Slayton, it showed that the 314 can was price- 18¢ a thousand higher than the 312 can, do they not?

A. That is correct.

[fol. 678] Mr. Fowler: Now, Mr. Allison, at a hearing had on August 9th, Mr. Taylor identified a letter or a price list, which there was some discussion about, without coming back and giving us some information regarding. Do you raise any question about this being in evidence as Defendant's Exhibit X or Defendant's Exhibit X-1?

Mr. Allison: We do not.

(Thereupon the said Exhibit was considered in evidence as Defendant's Exhibit X-1), which is in words and figures as follows:

DEFENDANT'S EXHIBIT X-1

| Price on Plain Coke Sanitary Cans per M | 202 x 300 $8.95 f. o. b. Baltimore, Md., freight equalized with Tampa, Fla., on carload water rate of freight | 200 x 309 $9.80 f. o. b. Baltimore, Md., freight equalized with Tampa, Fla., on carload water rate of freight | 202 x 312 $9.68 f. o. b. Baltimore, Md. | 202 x 314 $10.14 f. o. b. Baltimore, Md., freight equalized with Tampa, Fla., on carload water rate of freight |
|---|---|---|---|---|
| Litho differentials for can bodies in quantities of 500,000 or more—one color | 1.00 | 1.05 | 1.05 | 1.10 |
| Litho differentials for 202 can tops in quantities of 500,000 or more | .40 | .40 | .40 | .40 |
| Lacquering 202 dia. bottoms per M | .20 | .20 | .20 | .20 |
| | | | Approx. cost of freight from Baltimore to Tampa per M cans and ends .65 | |
| Total | 10.55 | 11.45 | 11.98 | 11.84 |
| Litho diff. for can bodies in quantities of 500,000 or more—2 colors | 1.30 | 1.40 | 1.40 | 1.45 |
| Each additional color in quantities of 500,000 or more | .30 | .30 | .30 | .35 |

[fol. 679] Mr. Fowler:

Q. Mr. Slayton, I hand you price list marked Defendant's Exhibit X-1 which was enclosed in a letter from the American Can Co., Tampa, Fla., M. M. Slayton, Local Sales Manager, to Bruce's Juices, Inc. Attention, Mr. J. Adams Bruce, and I call your attention to that fact that in that price list the differential between the 312 can and the 314 can is 46¢. Can you explain why that differential in 1939, after these invoices of 1939?

Mr. Allison: To which question Plaintiff objects on the ground that it appears on the face of the exhibits that the invoice price covers a lithographed can and Exhibit X-1 covers a plain can.

The Court: If that is correct the objection is sustained.

Q. Do you not know, Mr. Slayton, as a matter of fact, that when you sold cans and when I say you, I mean the American Can Co. in January 1939 that the differential in the plain can tin portion of the can was 18¢ between the 312 and 314 can and, that the 314 can was the higher: do you not know that?

A. I do not recall the figures. I have no records with me.

Q. You say that you do not know that is correct?

A. No sir I would not.

Q. Would you say that that is not correct?

A. No sir.

Q. You do know, do you not, that in January 1939 when you sold Bruce's Juices both the 312 and the 314 can, that the 314 can was the higher?

Mr. Allison: I presume you mean in price and not in height?

Mr. Fowler: Your presumption is entirely correct, Mr. Allison.

[fol. 680] The Witness: Oh, yes.

Q. I will ask you if it was not only a comparatively small differential?

A. As far as I remember.

Q. Now I will ask you, Mr. Slayton, the question eliminating the lithographing differential and taking that price list which includes lithographing differentials, which was sent out under your name on June 18th, in evidence as Defendant's Exhibit X-1, and tell us what was the price on the plain tin portion of the 312 and 314 can as shown by these invoices?

A. These invoices cover the plain tin cans with the lithographing differential.

Q. Will you figure what the lithographing differentials were and tell us what the plain tin portion of the can cost, using the price list that you have before you there, showing what the differentials were?

A. This letter is dated in 1940 and the invoices are in 1939.

Q. All right then, Mr. Slayton, tell us what the 312 and 314 cans were priced—what their price was including the lithographing, in 1940, using the price list Defendant's Exhibit X-1.

Mr. Allison: If the Court please, I do not want to unnecessarily object but this exhibit is in evidence and speaks

for itself and it just extends the record for the witness to state what it says on its face.

The Court: Let him answer the question.

A. This quotation is based on half a million can lots. Mr. Bruce bought in small quantities at a time. I do not know in what quantities he purchased at the time those invoices were rendered. He did not always buy in half a million lots.

[fol. 681] Q. Will you tell us what the price for the lithographed can is as shown in the price list which you have there marked Defendant's Exhibit X-1?

A. The 202-312 can according to this quotation would be $9.68 per thousand f.o.b. Baltimore, Md. and if purchased in 500,000 lots, in quantities of 500,000, the differential for the can body, the lithographing of the can body would be $1.05 per thousand cans: the differential for the can tops 202 diameter lithographed, would be forty cents (40¢) per thousand cans and the lacquering of the tops or bottom, and this applies exclusively to the bottom, 20¢ per thousand.

Q. You are figuring the 312 there?

A. The 312.

Q. That makes $9.68, plus what figures?

A. $1.05 plus 40¢ plus 20¢.

Q. That is $11.33 then for the 312. Now, what would be the price according to that, of a lithographed can for the 314 can. We start out at $10.14 as the plain portion of the can. What addition do you have on that?

A. $1.10 for lithographing on the can body in quantities of five hundred thousand or more; forty cents per thousand cans lithographing differential for the can tops; and twenty cents per thousand for the lacquering of the bottom.

Q. That only is $11.84, showing a differential for the lacquered can of 51¢ between the 312 and 314—is that correct?

A. That is correct. I neglected to mention in there that the lithographing differentials were for one color.

(There was no cross-examination.)

Mr. Fowler: We have no further witnesses. At this time are you going to have some witnesses?

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[fol. 682] Thereupon, the Plaintiff to maintain the issues on its behalf in rebuttal, there produced and caused to be

sworn as its witness, or recalled Defendant's witness M. M. SLAYTON who testified as follows:

Direct examination in rebuttal.

Mr. Allison:

Q. Mr. Slayton, you are the same person who has testified in this cause heretofore, both for the Plaintiff and the Defendant?

A. Yes, sir.

Q. Do you keep a record in your office in Tampa of the number of visits you make to your various customers?

A. We do.

Q. Do you keep such a records of the visits you make to Bruce's Juices, or that you have made heretofore?

A. Yes, sir.

Q. Will you please state how many visits you made in each of the years 1937-1938-1939-1940 and 1941?

A. In 1937 I personally visited Bruce's Juices 31 times.

In 1938—27 times.

In 1939—9 times.

In 1940—16 times.

In 1941—14 times.

That is a total of 97 visits or an average of over nineteen visits per year.

Q. Did you likewise keep a record of the calls which Mr. Taylor made on Bruce's Juices on each of those years?

A. Yes, sir.

Q. When did Mr. Taylor become associated with your Tampa office?

A. Late in 1937.

Q. How many visits did he make in 1938?

A. In 1938 Mr. Taylor visited Bruce's Juices 67 times.

In 1939—85 times.

In 1940—71 times.

[fol. 688] In 1941—59 times.

An average of over 70 visits per year.

Q. That is 282 visits, is it not—total?

A. That is correct. Now, there is a possibility that some of these visits that Mr. Taylor or I made to Bruce's Juices, that we might have been together on the same visit.

Q. Mr. Slayton, did you discuss at any time with Mr. J. Adams Bruce the question of the method by which he should transport cans to his canning plants?

A. Yes, sir.

Q. Do you recall about what time that conversation was?

A. I think the first time was in 1937.

Q. What methods were discussed, what transportation methods?

A. They were trying to figure whether it would be possible for them to get their cans in carload lots by rail against their present method at that time of hauling by truck.

Q. Did you at that time make any suggestions or give any advise to Mr. Bruce?

A. At any time that I ever visited Bruce's Juices, either on my own accord or at their own request I was always accompanied by their Superintendent, Mr. Thomas, who is a very able man and knows his business, and the first time I recall Mr. Thomas and I discussed the situation very thoroughly there was neither a spur track capacity nor was warehouse capacity sufficient to obtain their cans in carload lots.

Q. Did you make any suggestion or give any advise?

A. There was nothing that they could do about it. It was up to Mr. Thomas to decide, not for us to suggest.

Q. You are referring now to the condition at Bruce's Juices Plant?

[fol. 684] A. That is correct.

Q. Mr. Slayton, did that condition at Bruce's Juices Cannery later change?

A. Yes, sir.

Q. What was done to make the change, if you know?

A. They increased their warehouse or can lofts, to a slightly larger capacity and built a conveyor.

Q. What was the type of the conveyor, what did it do and where did it extend?

A. For the purpose of conveying the cans from the cars on the track to the can loft.

Q. From rail cars on the spur track into the storage place of the Bruce's Juices Cannery?

A. That is right.

Q. Do you remember about the date when that was installed?

A. I do not. It may have been around 1940 or 1941.

Q. Do you recall whether it was a considerable period or a short period after your first discussion with them about taking cans?

A. It was a long period of time.

Q. Was that the only occasion when you discussed with Bruce's Juices the method by which they would take delivery of their cans?

A. No, sir. I think I visited Bruce's Juices several times, as we were always very much interested.

Q. Did any of your other Tampa customers take delivery of cans by their own trucks?

A. Yes, sir.

Q. Did the American Can Co. pay any part of that trucking cost?

A. No, sir.

Q. Has that been uniformly true since the Tampa Plant was built of the American Can Co.?

[fol. 685] A. Yes, sir.

Q. Was your Tampa Plant equipped to effect these truck deliveries, I mean by that could you put the cans on your platform or so handle them that the trucks could pick them up?

A. Yes sir.

Q. Was it necessary to put the cans in sacks, bags or containers in order to handle them in that fashion?

A. Naturally it was.

Q. How do you load rail cars?

A. Either mechanically, in bulk—and when I say mechanically they are automatically conveyed from the manufacturing lines into the car where they are either stacked in bulk or they ship them in shipping cartons or in paper bags.

Q. When you load a car in bulk by the method described does that require more or less labor than putting the cans on the platform to be picked up by the customer's truck?

A. Considerably less.

Q. Could you compare the approximate volume of that business of the Tampa Plant by the railcar method with the deliveries by customer's trucks?

A. You are asking about all of the customers now?

Q. Yes, sir.

A. In what year?

Q. The average, if it did not vary.

A. The reason I asked that, before the plant was built the Florida Canners received their cans in cartons and they were shipped into this State by boat. When we built the Plant, we built it with the idea in mind that the majority of the customers would continue to take their cans in

cartons which they did for a long period of time, or as long as they enjoyed the water transportation rate out of Tampa [fol. 686] of the different products; in other words, they would bring in a load of finished products into Tampa, canned goods, and then pick up a load of empty cans in cartons.

Q. For the year 1939, if you recall, about what proportion of your Tampa factory cans were sent out by rail power compared with the volume picked up by customers in their own trucks?

A. As near as I can recall, about 65% of our total volume of business was cans in cartons by trucks in that year.

Q. And that included Bruce's Juices and other customers?

A. That is correct.

Q. What about the percentage for the preceding year—1938?

A. It was as heavy as that, if not heavier.

Q. Do you have any recollection as to the percentage for 1937?

A. I think it was as heavy if not heavier and it works back to the year 1935 when the Plant was built, when 100% of our business was taken out of here, cans in cartons, by truck.

Q. Did you ever have a claim on any other Tampa customers other than Bruce's Juices of a credit or allowance for trucking charges for picking up and transporting their own cans?

Mr. Fowler: We have no way of checking it and we do not know who they are and unless it is shown that the expenses were identical it is incompetent and irrelevant.

The Court: I do not think that is a proper question. Objection sustained.

Mr. Allison:

Q. Did you, at the time of the discussion with Bruce's Juices, regarding the method by which they should take their cans, make a suggestion or recommendation that they take them by truck?

[fol. 687] A. No, sir.

Q. When was your Tampa Plant put in operation?

A. Late in 1935.

Q. You mean by later in 1935 about what time?

A. In the Fall, I think it was in December, before we got into operation.

Q. Do you recall the date the Continental Can Co. Tampa Plant was put in operation?

A. I think it was in 1937. I am not sure.

Q. It was after the American Can Co.'s plant was put in operation?

A. Yes, sir.

Q. Does the Continental Can Co. have a factory elsewhere in Florida?

A. They did have previous to their coming to Tampa.

Q. Where?

A. Jacksonville.

Q. Is that in operation now?

A. No, sir.

Q. When did it discontinue if you know?

A. I think it was about 1940.

Q. Do any of your other competitors have can factories in Florida?

A. The Crown Can Co. at Orlando.

Q. Approximately when was that Plant put in operation?

A. I think about the year 1939.

Q. It is still in operation?

A. Yes, sir.

Q. Are there any other of your competitors in addition to those that you have named, operating in Florida?

A. No.

Q. I mean by operating, they have their own factories in the State?

A. No.

Q. Is the Continental Can Co. Tampa factory now in operation?

[fol. 688] A. Yes, sir.

Cross-examination.

Mr. Fowler:

Q. Mr. Slayton, Tampa was an f.o.b. point for the American Can Co. years before you put your factory in here, was it not?

A. For certain sized cans, yes, sir.

Q. And that is likewise true of the Continental, is it not?

A. Correct.

Q. Could you go down to Bruce's Juices whenever you decided that you wanted to go down there; they did not ask you to come all of these times?

A. Not all of these times. Many times they would call and many times we would visit at our own convenience.

Q. Their orders were generally given by letter or by telephone, were they not?

A. Correct.

Q. I will ask you if over 90% of the time they did not order in more than 500,000 can lots?

A. I do not recall the percentage. I do know that there were certain orders placed for lithographed cans that were in quantities smaller than 500,000 lots.

Q. With regard to the individual service cans, do you remember that they were ordered most of the time in numbers of over 500,000 lots?

A. That is correct. Most of them were.

Q. Mr. Morris called on the California Packing Corp. the same as Mr. Taylor called on Bruce's Juices?

A. Yes, sir, that is correct.

Q. How many times did Mr. Morris call on the California Packing Corporation for the year 1939?

[fol. 689] A. I do not have those records.

Q. You just brought them for Mr. Taylor?

A. Yes sir.

Q. Would you say it was approximately the same number of times that Mr. Taylor called on Bruce's Juices?

A. I believe I would be safe in saying that there is no other customer that we have in the Southeastern district that has been called on as many times as Bruce's Juices.

Q. I asked you if Mr. Morris called on the California Packing Corporation as many times?

A. No sir, our records would not indicate that.

Q. Would you estimate it, how many times?

A. No sir, I would not estimate it. I have the records in the office.

Q. But you did not bring them?

A. No sir.

Q. How many times did Mr. Taylor call on Stokeley Bros. in 1939?

A. I did not bring that record with me.

Q. You do not know how many times?

A. No sir.

Q. Or any others?

A. No sir, but we have those records.

Q. But you do not have those records with you?

A. That is correct.

Q. With reference to these hauling charges, was it not a fact that you had cans sent in for Mr. Bruce, or Bruce's Juices, from Baltimore and they were delivered on the dock, down here in Tampa?

A. That is correct, previous to the plant, to the operation of our Tampa factory.

[fol. 690] Q. You mean they have not gotten that way since the operation of the Tampa factory?

A. Probably there were some cans that we could not make in Tampa, shipped from Baltimore, and when they were shipped, in the majority of instances they were shipped by water and picked up at the dock, in the majority of instances we picked up the lithographed cans at the dock at our expense and hauled them over to our can manufacturing plant and they were picked up there by Bruce's Juices truck.

Q. They were shipped in here by water from Baltimore and you took them over to your plant?

A. That is right.

Q. I will ask you if Mr. Bruce did not ask you instead of hauling them to your plant that you haul them to the plant of Bruce's Juices which was much nearer to the dock and you refused?

A. That is correct.

Q. I ask you whether if he did not then ask you if he could not haul them from the dock to his plant and you would not allow Bruce's Juices what it cost you to haul them from the dock to the Plant of the American Can Co.; and you refused that too?

A. That is correct.

Q. Is that correct?

A. That is correct.

Redirect examination.

By Mr. Allison:

Q. Mr. Slayton, what size of individual cans were ordered in more than 500,000 lots by Bruce?

A. 203-314.

Q. Was that the big bulk of the orders over 500,00- of that size?

A. Yes sir.

[fol. 691] Q. These shipments that you just described to the Defendant's Counsel, which came in by water and were placed on the dock, how are those consigned or billed, to the American Can Co. at Tampa?

A. I think Bruce's Juices cans were billed to the American Can Co. at Tampa. They were lithographed cans.

Q. Did you- office here check those shipments to see that they corresponded with the bill of lading or shipping instructions?

A. Yes sir.

Q. If there was any claim of those shipments, who would have to make it?

A. It was our responsibility.

Q. If customers had been permitted to pick up those shipments from the dock and carry them to their own plants, would it have been possible to keep check of what was in each shipment?

Mr. Fowler: I think the witness is quite capable of telling why he did not do it without saying yes or no to a long question.

Mr. Allison: I will withdraw the question and ask you why did you handle the shipments in the manner that you did, that came in billed to the American Can Co. by water?

A. Because Bruce's Juices were no- equipped to handle cans in the volume in which they ordered in their warehouse.

Q. You mean that you had to store some of those cans in your own factory until he could call for them, and handle them?

A. That is correct.

Q. Because he did not have a place to take care of them?

A. That is correct.

Q. If they had stayed on the dock, would there have been any demurrage?

[fol. 692] A. There would have been.

Q. Was that the uniform method that you handled such shipments for other of your customers?

A. No sir, all other customers were equipped with warehouses of sufficient capacity that they could take up all of the cans they ordered at the dock and haul them back to their respective plants.

Q. Did they do that at their own trucking expense?

A. That is correct.

Q. You would not let Bruce's Juices pick up the cans at the dock and take them to their factory at their own expense?

A. That is correct.

Q. Irrespective that there might be all these others charges mentioned by Mr. Allison's examinations?

A. That is correct.

Q. You say that Mr. Bruce did not order other cans other than the 314 in amounts of 500,000?

A. I did not say that.

Q. When did you begin making the 314 can in Tampa?

Mr. Allison: Objected to as not in re-cross-examination.

Mr. Fowler: I will show the relativity.

The Court: Let him answer the question.

(Last question was read to the witness.)

A. I am trying to think. It would be a simple guess on my part. I do not have the record and have not studied it.

Q. You would just have to guess when you started making the 314 can in your factory here?

A. That is correct.

[fol. 693] Q. Would you guess then for us?

A. 1938, 1939, or 1940—in that period.

Q. Then, these cans that came in down there at the dock, in the individual service were cans other than the 314 cans, were they not?

A. Yes, sir.

Re-direct examination.

By Mr. Allison:

Q. The last question that Counsel asked you about the cans coming into the dock being other than the 314, over what period of time did that apply?

A. Special sizes that we were not equipped to manufacture at our Tampa factory and previous to the establishment of our Tampa factory.

Q. Was it—the 314 can handled that way until you were equipped to handle it at the Tampa factory?

A. Yes sir.

Q. Do you know whether, after that, any of those sizes were delivered by water?

A. I do not recall.

Thereupon the Plaintiff, further to maintain the issues on its behalf then recalled as Plaintiff's witness, in rebuttal, Mr. A. H. NUGENT, who further testified in behalf of the Plaintiff as follows:

Direct examination.

By Mr. Allison:

Q. Mr. Nugent, you have heretofore testified in this case both in the depositions in New York and here at this hearing, have you not?

A. I have.

Q. When was it that you became General Manager of Sales of Packers' cans of the American Can Co.?

A. In September 1936.

[fol. 694] Q. You have heard all of the testimony given at this hearing here today, have you not, I mean at this hearing on Oct. 6, 7 and Oct. 11th, and today?

A. Yes sir.

Q. Mr. Nugent, did you have anything to do with the fixing of prices on cans?

A. Yes sir, I did.

Q. You are familiar with the provisions of your Packers' can contract, are you not?

A. Yes sir.

Q. Will you please describe in your own words what was done in fixing the price of the 202 x 312 cans?

Mr. Fowler: If the Court please, I am going to object to that very general question. It assumes the witness to give his opinion of the motives and his interpretation of the same and it is not in a form that I could object to or tell from the question what is seeks except to let him make a self-serving declaration on a point in issue here.

The Court: Objection over-ruled.

(Thereupon the last question was read to the witness.)

Mr. Fowler: I take it that we are all allowed to exceptions to adverse rulings.

The Court: Yes sir.

(Thereupon the last question was read to the witness.)

A. I think I should read this paragraph of the contract which applies to the making of new prices for sizes of cans. other than those printed in the Contract.

(Whereupon the said paragraph was read by the witness.)

[fol. 695] Now then the No. 202 x 314 can is more similar to the No. 1 can as printed in the Contract?

A. In building the price or fixing the price for the 202 x 314 can first we take into consideration the amount of tin plate required for the 202 x 314 can as compared to the No. 1 can, then we take into consideration the solder used for soldering, the side seams, the compounds used as a sealing medium in the tops and the bottoms of the cans, defficiency in the cutting of standard plates for the two sizes quantities of cans estimated by the buyer and the cost of changing a can manufacturing line from one size over to the size to manufacture the 202 x 314 and subsequently changing back to the size under which the line was built; additional equipment that is required to manufacture the 202 x 314 can; and competition is always considered in the picture, and sometimes there is competition that must be taken into consideration in making the price.

The No. 1 Can, as printed in this Contract, which is Exhibit No. 6, for the No. 1 can is $13.85 a 1,000, on a $5.00 tin plate basis.

Carried to the one decimal point there are 1.8 base boxes of tin plate in the No. 1 can per 1,000 cans; and in the 202 x 314 can there are carried to the one decimal point, 1.4 base boxes per thousand cans, or a difference of .4 of a base box of tin plate in the two cans, the 202 x 314 having this much less tin plate in it than the standard No. 1 can.

The price of the 202 x 314 can, the plain can, on a $5.00 tin plate basis, which is the same that we have mentioned for the No. 1 can, was $10.14 a thousand, or $3.71 a thousand less than the No. 1 can, .4 of a base box of tin plate figured at $5.00 a base box, and the difference in the amount of plate required for the two sizes of cans is $2.00. Deducting the [fol. 696] $2.00 from the $3.71, there was a difference of $1.71 a thousand which showed that 2-2 x 314 was $1.71 a thousand less than the No. 1 Can.

As I stated previously in arriving at the price of the 202 x 314 can, we first took in the difference in tin plate. I have mentioned here that the difference in tin plate was $2.00 a thousand. There was slightly less solder in the 202 x 314 and in the standard No. 1 can because the length of the side seams of the 202 x 314 is 2/16" less than the No.

1 can. There is slightly more compound in the top and bottom of the 202 x 314 cans than in the No. 1 can and naturally those items would be deducted, and those items would be credited as against the No. 1 can.

I mentioned the deficiency in cutting the standard plates sometimes we find that in building a price that in rolling the plate to standard that there may be a very slight difference in the deficiency but I am not including this as a credit or debit because it is too slight.

The quantity of cans does become a debit when we have percentage-wise a lesser number of the cans that we are building a price for than the Standard Cans and I might mention here that we make in a year, many many times more of the Standard No. 1 can than we do of the 2-2 x 314 can.

Q. Is that true of all the individual service cans?

A. That is true of all of the individual service cans.

Additional equipment necessary to produce the size must be taken into consideration and that becomes a debit item. I mentioned that there was a $1.71 less than the price of the No. 1 can after taking off the tin plate, which is—I couldn't say exactly—when you take the credits and the debits as to whether that is the figure, but I am quite sure it was far less than the difference.

[fol. 697] Now then, I would like to compare with this 202 x 314 can the price of $9.68 for the 202 x 312 can.

The 202 x 312 can is the nearest to the No. 1 size printed in the Contract, the same as the 202 x 314 can. Using the price of $13.85 for the No. 1 can as printed in the Contract and which contains 1.8 boxes of tin plate figured to the .1 per thousand cans, this price of $13.85 for the No. 1 can was on a $5.00 tin plate basic; and using $9.68, the price for the 202 x 312 can on a $5.00 tin plate price; and in the 202 x 312 can there are 1.3 base boxes of tin plate figured to one decimal point, which makes a different in the amount of plate in the two cans .5 of a base box less in the 202 x 312 can than in the No. 1 can per thousand cans. Five-tenths of a base box of tin plate figured at $5.00 per base box is $2.50. Now, taking the price at $13.85 for the No. 1 Can as previously mentioned, and deducting the $9.68 a thousand which is the price for the 202 x 312 can you arrive at a difference of $4.17 and deducting the difference in the amount of tin plate in the 202 x 312 can, as compared to the No. 1 can, there remains a balance of $1.67.

I mentioned previously that after deducting the difference in tin plate between the 202 x 314 can and the No. 1 can there was a difference of $3.71 balance whereas there is only a $1.67 difference on the 202x312 can, which indicates that the 202x314 price at $10.14 a thousand, was four cents a thousand less than the $9.68 price for the 202 x 312 can. Now, that is just on the tin plate.

When the other factors are taken into consideration, I think it will be found that there is still a wider difference there but I am leaving it right on the tin plate basis and not considering the other items.

Q. Does mass production or quantities of the cans, the [fol. 698] particular size of cans manufactured, enter into the establishing of the price?

A. Yes sir. The quantity of cans does.

Q. Is that a material factor in establishing a price?

A. Very much so because it is very expensive to change a line from one size to another size, in that only men with the mechanical ability are used in making that change, or you might call them special mechanics.

Q. Can you make the 312 and the 314 can on the same line of machinery without any change?

A. No sir.

Q. Is that true of the varying sizes of all of the individual service cans, that the line must be changed?

A. That is correct.

In fact, I might state that any height or diameter change, the line has to be changed for that can.

Q. In fixing the price on a new size of can are you furnished with any information as to the volume required?

A. We ask the customer to give us his best estimate of the cans that will be needed.

Q. You have heard the testimony regarding the fixing of the $9.68 price f.o.b. Houston, have you not?

A. Yes sir.

Q. Did you participate in the fixing of that price?

A. Yes sir.

Q. Personally?

A. Personally.

Mr. Fowler: That is objected to as leading. I think the witness can explain. I submit that it is not proper to suggest the answer.

[fol. 699] Mr. Allison: I think if I could finish the question——

The Court: Go ahead.

Mr. Allison: That the Court could better rule.

Q. Were you furnished any information as to the volume of the 312 can at the time you fixed that price?

A. Yes sir, we were.

Q. We- you at that time equipped to manufacture the 312 can in the Houston plant?

A. Yes sir, we were.

Q. Had you heretofore been manufacturing it there?

A. No sir.

Q. Will you please say what factors or elements you considered in fixing the price of $9.68 on the 312 can f.o.b. Houston?

A. We considered the volume which was estimated by the customer, and we considered his figures as being reliable and the volume was very large. We had a line available for making the can at Houston with the exception of the change parts and we had these change parts. We had change parts for the can at New Orleans and those parts were transferred from New Orleans to Houston and installed in the line which we used to make the cans, so it did not require an outlay of any money for equipment.

We also considered the amount of tin plate that was involved in the two sizes of juice cans and the saving that would accrue to us by making the can at Houston rather than at New Orleans, in that it was cheaper to the American Can Co. to have the tin plate delivered at Houston rather than at New Orleans, where we had previously made a small quantity of these 202 x 312 cans, and the saving and [fol. 700] equalization of freight with the Houston. The price prior to that time, when we had equalized the freight, was 38¢ a thousand higher.

Q. When did you first sell the 312 can at the $9.68 price f.o.b. Houston?

A. During the early part of the year 1940.

Q. You heard the testimony that the price was quoted in September 1939?

A. Yes sir.

Q. And the first sale was early in 1940?

A. That is correct.

Q. Was that price of $9.68 which you established f.o.b.

Houston, also put in effect at any other factories of the American Can Co.?

A. Yes sir.

Q. What others?

A. At Baltimore, Md., Indianapolis, Ind., and I believe at Maywood, Ill.

Q. Were those the only plants equipped to make that size can?

A. Those were the only plants that had equipment to make that size.

Q. Do you have charge of the quoting of prices to your customers on can?

A. Yes sir, packer cans.

Q. What is the policy with reference to quoting prices on the various cans you manufacture, to your various customers: do you quote them all on every size that you manufacture?

A. No sir, we do not.

Q. What do you do, without any request from the customer, what is your policy?

Mr. Fowler: I submit that that is leading. The witness is quite qualified to answer.

[fol. 701] The Court: I don't think that is leading. I think he can answer the question.

A. On January 1st of each year we issue a price list showing the price of what we call the standard sizes of packers cans, and which are the five sizes printed in the Contract, Exhibit 6:

If a customer wants to use another size or sizes other than those shown on this Contract in a year, and asks for price or prices of those cans, we furnish him with the price or prices by letter or telegram, whatever the occasion may be.

I might add here that the American Can Co. makes, or did make, during normal times and through most of this period that is involved in the neighborhood of three hundred styles and sizes of packers cans, and I believe that I am safe in saying, and I think I am on the long side rather than the short, that any customer that we have including the big ones such as the California Packing Corporation, Libby, McNeil & Libby, did not use any one of those years more than 50, of the packers cans that we made.

Q. Was it your instruction or policy to quote prices when a change occurred as you described to the customer, on a size he had been using, other than those printed in the contracts?

Mr. Fowler: Objected to as leading.

The Court: I do not see anything leading about the question.

(The last question was read to the witness.)

A. Does that mean if he had discontinued the use of a size? [fol. 702] Q. I will withdraw the question. Do I understand that you quoted to customers any price change on any standard size printed in the Contract?

A. The price listed the first of the year, on January 1st showed the prices that were in effect with standard sizes or those printed in the Contract.

Q. That was furnished to all customers?

A. That went out to all customers.

Q. In addition to that, if for example, a customer had been buying a size other than printed in the contract, consistently, what was done about quoting prices on such a size?

A. We quoted him a price on that can by letter, that was in effect on January 1st of that year.

Q. Was that done whether or not you received a request for that quotation?

A. That was the policy of the Company. I could not say that was done 100% but I am quite sure it was done in practically all instances. If it was not done we would have continued with the price that was in effect if the price of tin plate had not changed.

Q. What was your policy with reference to quoting prices to a customer on a size not printed in the contract but which he had not been using?

A. We did not quote the customer a price on that basis.

Q. Do you know whether in September 1939 the Defendant, Bruce's Juices, was still buying the 312 can?

A. They were not.

Q. Had Mr. Bruce, or Bruce's Juices, given you any information concerning his future use of the 312 can?

A. In the Fall of 1938, Mr. Bruce informed us that he was discontinuing the use of the 202 x 312 can because of the [fol. 703] fact that it would not hold six ounces of his juices, and that he was going to the 202 x 314 which would hold

six ounces; and the reason that he gave to us for wanting to pack six ounces of juice in the can was because of Coca Cola's competition and that the Coca Cola bottle held six ounces. At that time we inquired as to what he thought his potential volume or estimate of the 202 x 314 can would be for the following year, and he gave us that estimate, which ran into a great many millions of cans; and then the question came up in regard to putting in a line for making that can at Tampa.

Without going into too much detail, an appropriation was made by the Company for the building of that line and it was installed sometime during the year 1940.

The price which we had been charging for the plain can 202 x 314 in Baltimore was put into effect, or I may say the price of the can became effective when we started, the price of $10.44 a thousand for the plain 202 x 314 can became effective at Tampa f. o. b. our factory, with switching charges allowed where the can was taken by rail and not allowance for truckage when the cans were taken by truck.

That line of equipment cost us a great many thousands of dollars. I think it was somewhere in the neighborhood of $100,000.00, and it was equipped when it was shipped for the 202 x 314 cans.

It developed that Mr. Bruce's estimate of the potential volume that he expected to use of these 202 x 314 cans——

Mr. Fowler: Was that estimate in writing?

A. I could not say whether it is in writing but the exchange of correspondence is in our files in regard to the estimate, I am quite sure.

Q. Do you have the file with you?

[fol. 704] A. No sir, I do not have the file with me.

Mr. Fowler: I submit that if he came here to testify on this point he should have brought this file that substantiates it.

The Court: If he has got any correspondence he can furnish it later. Let him go on and testify.

(Thereupon the answer of the witness was read as far as it had proceeded.)

(Thereupon the witness further answered as follows):

A. —was far in excess of what the actual usage of the cans was.

We expected, on the volume that he had mentioned, to run the line steadily through at least the active canning season, and possible a few weeks before the canning season, in order to store up cans for emergencies, but it was necessary to change that line several times because the volume of the line was far greater than the requirements of Bruce's Juices.

Mr. Allison:

Q. You mean the volume that the line could produce of that size?

A. Yes sir, the volume that could be produced on that line either per minute, or hour, or by the day.

Q. Did you sell the 312 can at $9.68 f. o. b. Baltimore to any Florida canner after you fixed that price f. o. b. Houston in September 1939?

A. After September 1939?

*A*. Yes sir.

A. Yes, sir.

Q. When was the sale made?

A. It was made in 1940.

Q. Do you recall to whom the sale was made?

[fol. 705] A. It was made to Pasco Packing Co. at Dade City, Fla.

Q. What was the price?

A. $9.68 a thousand f.o.b. Baltimore.

Q. Who paid the freight on them?

A. Pasco Packing Company.

Q. Is that the only sale of the 312 can at that price in Florida?

A. Subsequent to 1939?

Q. Yes sir.

A. Yes sir.

Q. And have you sold 312 can at any other price than that in Florida?

A. No sir.

Q. Did you quote that price to Mr. Bruce?

A. Yes sir, we did.

Q. I would like to have you state when you quoted it to him.

A. It is on the record in an Exhibit there that you had this morning.

Q. Am I correct in understanding that you fixed the price of $9.68 for the 312 can f.o.b. Houston, in September

1939? and that your first sale at that price from the Houston factory was in early 1940?

A. Yes sir.

Q. And the same price was fixed f.o.b. Baltimore and the only sale thereafter in Florida was one to Pasco Packing Co. at Dade City, Florida, is that right?

A. That is correct.

Q. Do you have in Florida an instruction regarding the confirmation of telephoned orders for cans?

A. Orders for cans? Orders that are entered by customers by telephone?

Q. Yes sir.

A. Yes sir, we do.

Q. What if a customer writes a letter and places an order?

[fol. 706] A. Our policy and our instructions to the Division and District Offices is that any order received whether by telephone or telgram, by letter or in any other manner, should be accepted either by telegram or letter as the urgency of the case may demand.

Q. Is it your policy then to confirm all orders, however, received?

A. That is the policy.

Q. Did you sell the 314 to other Florida canners during the period of time in question?

A. Yes, sir, we had other customers using that size.

Q. Do you recall how many customers used it in Fla.?

A. I am quite sure there were three, the Florida Fruit Canners, Florida Gold and Pasco Packing Co.

Q. What price was quoted on the cans?

A. On a $5.00 tin plate basis they were quoted at $10.14 a thousand for the plain can f.o.b. Tampa, after we started making cans in Tampa.

Q. Do you recall ever any of them used the 314 can before you started to make it in Tampa?

A. I feel quite sure that Bruce's Juices was the first user of the 202 x 314 can and that these other customers of ours started purchasing after Mr. Bruce had introduced it.

Mr. Fowler: I submit he has not answered the question.

Mr. Allison: Do you know whether other Florida customers were using the 314 can before you began manufacturing the 314 can and the line that you described was installed in the Tampa, Fla. factory?

A. They were, yes sir.

Q. They were taking it from Baltimore?

A. From Baltimore.

Q. Upon what price terms were they buying it, the same as Bruce?

[fol. 707] A. Exactly.

(Thereupon adjournment was had until two o'clock P. M. October 12, 1943 at which time the Court duly reconvened and the following further proceedings were had and testimony taken.)

Thereupon A. H. NUGENT was recalled and further testified as follows on behalf of Plaintiff.

Direct examination continued.

Mr. Allison:

Q. Mr. Nugent, you heard Mr. Bruce's testimony regarding the three-way telephone conversation about June 17, 1940?

A. Yes sir.

Q. Do you recall that conversation?

A. Yes sir, I remember it very well because the charges were reversed at the time.

Q. Was it a lengthy call?

A. Very lengthy.

Q. About how long would you say it lasted?

A. I think from—I should think from three quarters of an hour to an hour.

Q. During that period of time in the month of June 1940 did you have other telephone conversations with Mr. Bruce?

A. I cannot put it right in the month that they approximately were; I won't say definitely that they were in the month of June.

Q. During that time did he personally visit your New York office?

A. Not right at that time. He had been there previous to that time.

Q. Were you in Florida during that period of time? June 1940?

A. No.

[fol. 708] Q. When was the last time you were in Florida? —prior to this trip today?

A. In September 1937.

Q. During the three-way conversation described in June 1941 at which Mr. Jenkins was the third party, what was said about the 312 can?

A. Mr. Bruce wanted a price on the 312 can and he wanted it f. o. b. Tampa; that is the price of $9.68 that we had in effect at Baltimore, Md.; and I asked him at that time if he intended to use the can; he would not give me any satisfaction; the reason why I asked him if he intended to use the can was because he had—(the witness was interrupted by the following objection):

Mr. Fowler: I object to his reasons. He is talking about a conversation now and that would be a self-serving declaration.

The Court: He can give a reason for anything he says in the conversation, confining his answer to the conversation. If reasons were given he can certainly speak them—he can state anything that happened in that conversation.

(The last question and answer was read to the witness.)

By the Witness: —if he intended to use that can in Tampa, Florida.

Mr. Fowler: That is not according to the Court's ruling because that is not a part of the conversation.

The Court: If he told him in the conversation his reasons he can repeat them here. If he did not, he cannot repeat them.

Mr. Allison:

Q. Did you tell Mr. Bruce why this reason existed?

A. Yes sir, because he had previously decided definitely that he could not use anything else but a six ounce can in this Tampa territory on account of his competition with the Coca Cola.

[fol. 709] Q. Go ahead.

A. And I asked him at that time to place an order, if he definitely wanted the can, which he did not do. We received no letter from him or anything to the effect that he wanted the cans for use in Tampa.

Q. Did he ever place an order for any definite amount of 312 cans for use in Tampa thereafter?

A. No sir.

Q. During that conversation did he discuss his plans to pack tomato juice in Florida?

A. I think he said that he intended to pack tomato juice in Florida. The time has been so long I cannot remember just what he said about packing tomato juice in Florida but I am quite sure he said he intended to pack tomato juice.

Q. At that time did Mr. Bruce give you an estimate of the number of cans he would require for his tomato juice pack?

A. I am quite definite he did not.

Q. Are you definite in your recollection that he did not place an order for the 312 cans for Florida use.

A. I am sure that he did not place an order at that time.

Q. After that conversation in June 1940 other than the once you have mentioned to Pasco Packing Co. did you sell the 312 can in Florida?

A. No sir, we did not.

Cross-examination.

Mr. Fowler:

Q. Mr. Nugent, when he asked to buy and wished to order the 312 can in that telephone conversation, you told him that he could not have it as he had bought it the last time when he was buying other cans, that is with water rates of freight [fol. 710] allowed to Tampa, did you not?

A. I did not mention any other price other than the $9.68 f. o. b. Baltimore. There was nothing with regard to a price at Tampa.

Q. You did not give him any price at Tampa?

A. No, sir, not on the 312.

Q. On the 312. In that conversation he knew that if he wished to get that can in Tampa that he would have to pay $10.33 for it.

A. That was the quotation.

Q. $10.33?

A. No sir, $9.68.

Q. F. o. b. Baltimore?

A. Yes sir.

Q. And you told him that he would have to pay it f. o. b. Baltimore?

A. I told him that quotation was f. o. b. Baltimore.

Q. And that was the only order that you took, was f. o. b. Baltimore, not with water freight allowed for Tampa; did you not tell him that if he bought the cans for $9.68 in Baltimore for use in the Tampa plant, that he would have to pay the freight to Tampa?

A. That was the quotation, $9.68 Baltimore.

Q. Then was that not equivalent to telling him that he would have to pay the freight to Tampa?

A. I asked him to place an order which was not done.

Q. If stating the price of $9.68 f. o. b. Baltimore, answer if that was not equivalent, that he would have to pay the freight on it to Tampa?

Mr. Allison: That is objected to as argumentative.

Mr. Fowler: He is avoiding the question, if your Honor please.

[fol. 711] The Court: He can ask him anything that he said in the conversation but not say it was "equivalent" to.

Mr. Fowler:

Q. Was not the substance of his conversation to the effect that he would have to pay $9.68 Baltimore and then pay the freight to Tampa for his Tampa plant.

A. Nothing was said about the freight. When we quote our prices we quote them f. o. b. factory and the customer assumes whatever freight there is on the shipment.

Q. When you quoted him the $9.68 Baltimore, that was saying to him that he had to pay the freight to Tampa, was it not?

A. That would be assumed that he would have to.

Q. And you refused to take an order on the same basis that he had been buying the little cans, that is with water rate of freight allowed to Tampa on it?

A. No sir, we didn't refuse to take an order.

Q. You told him that was the only way he could buy it, at Baltimore?

A. We told him f. o. b. Baltimore.

Q. At the same time all the other small cans were being priced f. o. b. Baltimore, water freight allowed to Tampa?

A. With possibly one or two other sizes that Bruce's Juices had been using in small quantities, but those prices continued in effect with that provision.

Q. With what provision?

A. With the freight, water rate of freight would be equalized to Tampa.

Q. Name any can of the little can individual service group on which the water rate of freight was not allowed to Tampa at that time.

[fol. 712] A. There was no can other than that of the little cans that they were using.

Q. Are there any little cans that were used in the individual service group other than the cans that are in evidence here, which include all of the cans except the No. 1 can.

A. I didn't get your question?

Q. Are there any other cans that were used in canning tomato or citrus juices in the individual service group except those introduced in evidence here and now before you on the desk, except we are not including in that the No. 1 can.

A. 202 x 312 was one of the cans on which we did not allow the freight.

Q. On the other four you did—did you not?

A. I don't know whether we shipped any of those 309 cans here after the price of $9.68 was made to Bruce's Juices, I don't know.

Q. Did you not allow freight to anyone that used to buy them in Tampa, from Baltimore—on all four of those other cans?

A. There was no other demand up to them—Bruce's Juices.

Q. Did you not give a price in which you agreed to allow freight on these four other cans to Bruce's Juices?

A. They did not ask for it.

Q. That was your regular price to anybody in Florida, was it not?

A. If they had wanted to use the cans that would have been the price to anyone.

Q. In the individual service group is the Coca Cola competition everywhere, not just in Florida?

A. I would not know that because the information with regard to Coca Cola came from Bruce's Juices.

Q. You don't know whether Coca Cola is a competitor [fol. 713] with the individual service cans anywhere else than in Florida?

A. Not definitely—no.

Q. Will you compare the amount of tin plate in the 312 can as compared with the 314 can, what is the difference in the amount of tin plate between those two?

A. In actual tin plate there is four-tenths of a base box less tin plate per thousand cans in the 202 x 314 than in the standard No. 1 can 211 x 400.

Q. In other words there is just about 2/16" in height?

A. You have asked a different question. You asked the difference in the tin plate between the two—202 x 214 and the No. 1 can.

Q. No sir, I said the 312 and the 314?

A. There is one-tenth of a base box of tin plate difference in a thousand cans.

Q. What were the estimates of the other Florida canners in the Fall of 1940 for their needs in the 314 can?

Mr. Allison: If the Court please, I think that is foreign to the issues here. They are not involved in this proceeding and it has no relation to the indebtedness sued upon.

(After argument of Counsel the Court stated as follows:)

By the Court: Answer the question.

A. Yes, sir, we had other customers here whose combined requirements or combined estimates were far below the estimate that had been given by Bruce's Juices for that can.

Q. How much did Bruce's Juices estimate in the Fall of 1940 it would use in the coming citrus season?

A. I don't have the records here and I do not know but I will obtain that information. But I remember that the [fol. 744] quantity was 70,000,000 cans. That was their anticipated requirements.

Q. Will you produce your written records?

A. It came from our men at Tampa, our Sales Office at Tampa.

Q. It did not come from Bruce's Juices?

A. I don't know how that letter reads and will be glad to produce it.

Q. If you have any written estimate from Bruce's Juices which you say that you recall as seventy million, you will produce it?

A. Yes sir.

Q. How much did Bruce's Juices actually use in that coming season?

A. These records are on the calendar year basis.

Q. Actually they estimated for a fruit year, didn't they?

A. These are the shipments in the calendar years, and in the calendar year of 1939. You are talking about the 202 x 314?

Q. I am talking about the individual service cans.

A. About 202 x 314. 202 x 314 in the year 1939, they used 11,382,000 in round figures. In 1940 they used 14,192,000. In 1941 6,305,000. That is actual count—not the estimate.

Q. 202 x 312?

A. 1938 they used 1,021,000, in 1939 240,000.

Q. This 70,000,000 that you say they estimated in the Fall of 1939, was it not, or 1940?

A. No sir, he informed us in the Fall of 1938 that they were going into this six ounce can, 202 x 314, in a very big way, and they intended to discontinue the 202 x 312, which is proved by their shipments; at that time negotiations were started to get the volume that they anticipated to use in the 202 x 314 can in subsequent years; not so much in 1939 because that was the starting point; but the picture that was painted by Mr. Bruce—(witness was interrupted by the question).

[fol. 715] Q. Was that painted to you?

A. Yes sir, that was painted to me.

Q. What did he say to you?

A. He put it in millions and millions of cans because that was this anticipated growth that he had in mind that was going to be increased as time went on; so on the strength of these various discussions, not only in our office but down here in our local Sales Office, it was decided in 1939 sometime to appropriate this money to build a line for that size to be installed at the Tampa factory, for that size can.

Q. I will ask you, if in your direct examination, you did not say that you installed this line in Tampa in the Fall of 1940?

A. I am quite sure that I stated that we installed the line sometime in 1940.

Q. And that Mr. Bruce had estimated that they would purchase a large number of cans in the coming season and they did not purchase near as many cans as they had estimated?

A. I said that I did not have that letter before me in which the estimate was given, and I remember in my own mind that there was a figure mentioned of seventy million cans, and I would want to refer to the letter to make sure as to the quantity.

Q. But you also said that you knew that Mr. Bruce did not take, in that first season after you had the line here, near as many cans as he said he would; did you not state that this morning?

A. I do not recall making that statement. Possibly he did not take as many cans as we had estimated, but that information came in from our district office down here.

Q. Then you did not mean to say that he did not take the amount of cans he said he would the first season that you put the 314 line in here?

A. Not unless I looked up that letter.

[fol. 716] Q. You are not in position to say that now without looking at some letter, are you?

A. No sir, I would have to refresh my memory.

Q. Now, you testified here this morning as an expert in the manufacture of cans.

A. Not as an expert in the manufacture of cans, no sir.

Q. You have testified in detail about the different tin plate required and how they are manufactured, this morning.

A. I testified to the elements of costs that go to make up certain cans.

Q. I believe you testified that it would cost considerable money to change a line to make a different sized can this morning; is that correct? Whether it is a diameter change or a height change.

A. The height change is less expensive than the diameter change.

Q. But is a height change also expensive?

A. Yes sir. I would say it is expensive.

Q. I will ask you if it is expensive to change a line to make the 312 that has been making the 314 and vice versa?

A. Yes sir, it would be. It is necessary to change the line from the body maker clear through including the runways to the tester, and from the end of the tester by runways to the cars to wherever the cans are consigned.

Q. You testified in New York on April 1st and 2nd, did you not?

A. Yes sir.

Q. I will ask you if in answer to the following question, page ninety; paragraph Q. "Now, in making cans of approximately the same size, what change, if any, must be made in any of your lines to change the size one two-sixteenths of an inch."

A. "That is not a big change if it is only in the height of the can."

[fol. 717] By the Witness: I still say it is not a big change.

It is changing it down to a shorter height but it is a change all of the way through the line that makes it expensive.

Q. I will ask you if you did not also state on page 91: "We have certain types of body makers on which we can manufacture certain diameter cans for instance from 202 up to and including 404 diameter. In changing from one height can to another where we have diameters change, part of the expense is nominal, but where it is necessary to make a new diameter the cost of making a new change part is very large."

Q. You testified to that?

A. I testified to that. It is much more expensive to change the line where the diameter is involved than where just the height is involved.

Q. I will ask you if you did not also state this answer but I will read you the question ahead of it?

Q. "Now, just what would have to be done if a can line has been making a can, say 202 in diameter by 309 in height and you wish to change the line to make cans 202 in diameter by 312 in height?"

A. "If you had not made the 312 height can before?"

Q. "If you had not made it on that line?"

And then if you did not furnish this answer, later, after deliberation:

"A. If it was a new height of can and the diameter change parts available, we could make it on one of the lines we have mentioned but there would be some money outlay for the height change parts."

You stated that?

[fol. 718] A. That would be in regard to the height change part.

Q. If you have the height change part the outlay is very nominal?

A. No sir, the cost of the height change, because if you have a certain can then there are certain changes needed that are not very expensive for the additional height, that are not very expensive, but when it becomes necessary to change the line all of the way through for the height it is quite expensive.

Q. Did you not, to the following questions, give the following answers:

"Q. Now just what change would it take to make a change from the 309 to 312 which is a change of 3/16" in height" and you answered:

"A. I don't know."

Q. "Do you remember that?

A. You asked me for a definite figure.

Q. And that was your answer?

A. That is right.

Q. I asked you then: "Q. You do not have that knowledge?" And you answered:

"A. No, that is a machinery matter." Do you remember answering that?

A. Yes sir.

Q. "Q. You do not know how much of a job it would be?" "A. No sir." That was your testimony in New York?

A. Yes sir, that is true.

Q. Have you studied up on these can matters since that time?

A. No sir, I have not.

[fol. 719] Q. Now there is considerable less tin plate in the 309 can than there is in the 312, is there not?

A. No, there is not considerably less.

Q. There is a greater amount however, than there is between the 312 and the 314, is not that true?

A. Yes, sir. The 312 can is 3/16 higher than 309 and the 314 is 5/16 higher than the 309 can.

Q. But the 314 is only 2/16 higher than the 312?

A. That is right.

Q. Tin plate from which the 314 and the 312 cans are made are both rolled at the mill for the particular size of can to eliminate wastage; is that correct?

A. That is generally true but after we once get started with a can and have the volume for it, we order what is called standard plate.

Q. And from this standard plate you cut the individual pieces of tin from which a can is rolled and there is only a very small difference in the size of those sheets of tin from which these two cans are rolled, is that correct?

A. I cannot quite get it?

Q. The individual sheets from which the cans are rolled on the 312 is 60.718" x 3.875", the plate from which the can is rolled?

A. No, sir, the plate itself for any can would come in much larger shapes than that.

Q. But after it is cut and ready to have cans made out of it?

A. I don't know off-hand the diameters of the body itself.

Q. That is only the cut edge?

A. That is what we term it—the cut edge for the body.

[fol. 720] Q. Is not that correct for the 312 can?

A. I couldn't tell you. I haven't checked up on that.

Q. You really don't know the difference in the size of the cut edge, in the size of the 314 and the 312?

A. No, sir, but we figure the cost and know how much tin plate is used.

A. I am asking you about this.

A. When we order the plate for a certain sized can it does not mean that we are going to use all that plate in that body for bodies because a portion of it has to be trimmed and we take what is required of the gross amount of plate that is used, not the net amount.

Q. Then both of these cans have a special plate which you order for them?

A. Yes, sir. At the time we were making them in volume it has. We had standard plate in the two sizes.

Q. Under the terms of your Contract how will you explain that, in your price list of June 18, 1940, you charged more for the 309 cans than you did the 312 cans?

A. As I stated this morning, we took into consideration in figuring the cost or figuring the selling price of any can such items as, first, the difference in the amount of plate involved, solder, compound, deficiency in cutting the standard plate, plus the quantity of cans that were estimated by the customer, the cost of changing the lines to make the cans and then changing back to another size, additional equipment involved, and competition.

Q. Just what competition did you take into consideration in pricing the 312 cans.

A. We had a situation down there in Houston and in the Valley that developed, and I went down to see this man.

[fol. 721] Q. What man did you go down to see?

A. A Mr. McDaniel at Engleman Gardens and after a lengthy discussion I was able to sell him at our price rather than for him to go through the detail that he had in mind where he had told us that he could make these cans at a much lesser price.

Q. Buy them at a lesser price?

A. I didn't say buy, I said make them.

Q. He was going to make them himself?

A. Yes, sir.

Q. Engleman Gardens was going to make their own cans?

A. That is correct.

Q. So, in order to keep them from making them himself you made him this price?

A. I did not.

Q. That was the first time the $9.68 price had been made?

A. I made him the price of $9.68. I had that price in mind when I went down there because of the saving that we could effect by making the cans at Houston and the difference in the amount of plate involved in the two sizes, and was successful in selling him at this price of $9.68, not because of the competition that I mentioned?

Q. Then why?

A. I say that I was able to sell him at the price of $9.68 against the price that he thought, and he had been shown that the cans could be made for.

Q. That was the first time that the $9.68 was ever made, was it not?

A. That was the first price we had on that but it was figured in New York. I figured it along with our men and I did not go below the price that I had in mind quoting if there was not competition in the picture at all.

Q. But you just made the statement that you had a competitive proposition that you had to meet.

[fol. 722] A. No, sir, I did not.

Q. Competition had nothing to do with this price that you made?

A. No, sir, it did not. I knew that competition was in the picture but I did not have in mind when I made this price of $9.68, I did not have in mind the competition, that we were going to meet it or anything. It was a proposition of going down there and selling him.

Q. And you took that price and went down there and sold him?

A. Yes, sir, and he finally agreed to take our can.

Q. And you agreed to make the can at Houston?

A. Yes, sir. But I found in figuring the cost of the 202 x 314, in tin plate alone, was three cents lower than the 202 x 312 that I named him the $9.68, and I testified to that this morning.

Q. Before that time you had been making the 202 x 312 in New Orleans?

A. Yes, sir, and equalizing the freight with Houston.

Q. Because you had your plant there?

A. Yes, sir.

Q. That was in accordance with your general policy, was it not?

A. We had only the one customer.

Q. That was in accordance with your general policy to equalize freight to the point where you had a can factory?

A. No, sir.

Q. That is not the policy?

A. That is not the general policy.

Q. I hand you a letter and ask you if that is your signature, dated September 9, 1938.

A. Yes, sir.

Q. Is that your signature?

[fol. 723] A. That is correct.

Mr. Fowler: I will ask that this letter be marked Defendant's Exhibit F-20 and I will offer that later in evidence.

Mr. Allison: Do you have the letter to which this is a reply.

Mr. Fowler: Yes, sir, we have the letter to which this is a reply.

Mr. Allison: We have no objection to the exhibit being offered out of order.

Mr. Fowler: I will read the letter signed by Mr. Nugent on the stationery of the American Can Co., New York City.

(Counsel reading the letter Defendant's Exhibit F-20 to the Court, which is in words and figures as follows:

DEFENDANT'S EXHIBIT F-20

American Can Company
New York Central Building
230 Park Ave., New York

A. H. Nugent, General Manager of Sales

September 19, 1938.

Bruce's Juices, Inc., 205 E. 42 St., New York, N. Y.

Attention: Mr. D. Edwin Smalle

GENTLEMEN:—

We have your letter of September 15 in reference to the tomato juice cans which were shipped from our

Baltimore factory to the Genesgo Jam Kitchen, Geneseo, New York for your account."

On shipments of these cans from our Baltimore factory to your plant at Tampa, Florida we equalize freight with our Tampa factory, and as the freight to your factory at Tampa is the same as to our plant at [fol. 724] the same point you do not have to pay any freight on the cans. On the shipment from Baltimore to Geneseo we equalize the freight with our Fairport, N. Y. factory. The can rate from Baltimore to Geneseo is 53¢ cwt., and from Fairport to Geneseo 23¢ cwt., freight equalization being 30¢ cwt. Therefore, of the $74.20 total freight we assumed $42.00. In accordance with our contract, freight is equalized with the nearest factory of our competitor. Continental have a plant at Syracuse, N. Y., but the freight rate from that point to Geneseo is quite a little higher than from our Fairport factory, so we decided to equalize freight with our own factory making the net freight cost to you quite a lot less.

Very truly yours, (signed) A. H. Nugent, General Manager of Sales.

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Mr. Fowler: I will ask you, Mr. Nugent, if in your testimony in New York on Page 88, this question was not asked you:

"Q. Mr. Nugent, I will ask you to tell—to state the pol-cy of the Corporation The American Can Co. during the period in question with reference with freight charged to a customer with reference to the location of one of your Plants or a distributing point."

"A. Our general policy was to equalize freight on shipments of packers cans with competitive points."

"Q. Was it not also to equalize points where you have or have had a factory or warehouse in which you make a general distribution in a particular territory?"

"A. Only on certain size of cans and depending upon competitive conditions."

You testified to that in New York, did you not, Mr. Nugent?

A. Yes, sir, I did.

Q. All right now. At the time you installed this can line to make the 312 can in Houston, Engleman Gardens estimated their needs, did they not?

[fol. 725] A. Yes, sir.

Q. What did they estimate?

A. I would have to refer to the records, although it is my belief it was somewhere around the seventy-two million.

Q. In what length of time?

A. In one season.

Q. In what season was that; in the sea-on of 1940-1941?

A. Yes, sir, it was the sea-on of 1940-1941.

Q. And the- gave you a Firm order at that time, did they not?

A. No sir, they did not—not for that quantity.

Q. But for a part of that quantity?

A. You mean at the time I called on them?

Q. At the time you gave the price and agreed to put the can line in down there?

A. We did not agree to put any can line in any place. We agreed to make the cans at Houston but we did not agree to put in a line.

Q. You agreed to make the cans at Houston?

A. Yes, sir, because we had the equipment there and the line installed and only had to move the change parts from New Orleans to Houston.

Q. What order did they give you at the time you agreed to make the change? And made them that price?

A. He did not give me any order at that time. He showed me all of the experimental that he had done and how he was lined up for handling this small can and the advertising that he was preparing to put out, and all of those things, and our dealings with Mr. McDaniel prior to that time were such that we had no reason to believe that he was not telling us the truth.

Q. How much did he order from you for the season?

A. We are talking about individual cans?

Q. Yes, sir. How many cans did they take in the year 1941-1942, referring to Engleman Gardens.

[fol. 726] A. As I stated, the records that I have here are on a calendar year basis rather than on an operating basis.

Q. Give us what you have.

A. I will give it to you the same as I did for Bruce's Juices. In 1939 they used 18,214,000.

In 1940 they used 31,389,000.

In 1941 they used 1,553,000.

Q. And in 1942.

A. They did not use any.

Q. And what did they use in 1938.

A. Engleman Gardens used 689,000.

Q. Can you tell me how much they used in 1939 before you made the price of $9.68?

A. I would have to check that with our records—that is on a calendar basis, and of these eighteen million that they used most of them were used in the Fall.

Q. Will you furnish us with that information.

A. Yes, sir, I believe that all those were bought before that price—at the higher price, because he did not take any of the 202 x 312 at the $9.68 price until after the end of 1939. The first that we shipped at that price was in the year 1940.

Q. Did you give him any reduction on the cans that he had on hand or equalize down to the new price?

A. Oh, no.

Q. Where had he been getting his cans previous to that, and where were they made previous to that time.

A. The small cans?

Q. Yes, prior to the time you gave him this new price.

A. He had been getting them from New Orleans. I would want to check that. I do not think we were equipped at [fol. 727] Houston in 1939, that we had not moved the change parts over to Houston in 1939. That is something I will check.

Q. If that is not correct, will you inform us?

A. Yes, sir.

Q. I will ask you if it is your contention that one of the reasons you refused this price was on account of cost of manufacture, reduced cost of manufacture?

A. No, sir. By changing the source of supply of these cans, or that is by transferring the equipment over to Houston and having our plate sent into Houston rather than in to New Orleans and not having to equalize the freight on the cans with Houston, we saved, as I remember the figures, 25¢ a thousand, and then the difference in tin plate on the two cans, when it was taken into consideration, then we went the rest of the way to 13¢ a thousand.

Q. Will you explain why the 309 cans cost 12¢ more than the 312 cans when it is 3/16" smaller, why you priced it 12¢ more in your price list?

A. Yes, sir, because these elements that were necessary to produce it and the quantity of cans that were involved and the items that I mentioned here, such as deficiency in cutting the plate, our standard or regular plate, whether the quantity would justify ordering standard plate here, the cost of changing the lines backwards and forwards, and the additional equipment if necessary, there were a number of elements that were taken in.

Q. This price list, Defendant's Exhibit 1, was based upon the same number of cans being ordered *with the same number of cans being ordered* of the 309 and the 312 and the 312 being a smaller can, how do you explain that you charged 12¢ more for the smaller than for the larger can? [fol. 728] A. There were not really as many of the small cans used as there were 312.

Q. How many of the 309 cans were used or made by the American Can Co. in Baltimore in 1940?

A. You mean for juices?

Q. Yes, vegetables, the same can equivalent to the one you have introduced in evidence, 202 x 312, how many were made in 1940.

A. I thought the question started out with 309 cans?

Q. All right, the 309 cans. I am going to ask him for both.

A. We would have to obtain that information from the records. I don't believe I have that for the total of one factory.

Q. Would you not say that there were more 312 cans made in Baltimore than there were 309 cans in 1940?

A. I would not want to answer that without first looking at the records to make sure.

Q. You cannot at this time, say that there were——

A. No, sir, I would have to look at the records. I really do not know how many 309 were made. As I recall there were very few used for this juice that we are talking about of the 309.

Q. They were not the same can used for other purposes?

A. If you are talking about the same can?

Q. 309?

A. The lithographed can and maybe if there were more of the 309 made, maybe there were some of them a different type of can from what they were using for juices because the can that Bruce's Juices was using was a lithographed can.

Q. They are all plain before they are lithographed?

A. Yes, sir.

Q. You would not say that there were more 312 plain [fol. 729] cans made in Baltimore, in the Baltimore factory than the 309 cans, would you.

A. I don't know. I would have to check it.

Q. How much did you say you reduced the price of the 312 can when you installed or rather started making this can in Houston?

A. It had been $10.06 and we reduced it to $9.68, thirty-eight cents difference.

Q. How much did you reduce the 314 can when you started making it in Tampa?

A. We had had a very low price on the 202 x 314 can at Baltimore, and when we started making the can down here where the Bruce's Juices could obtain that can right at their door by carload lot, we continued the price of $10.14 which was in comparison to the 202 x 312 that we sold to Engleman Gardens at that time for $10.06, and they had it at $10.14 at Tampa. After we started making the cans here in Tampa, we used the same price, $10.14 a thousand for the plain cans at our Tampa factory.

Q. In other words you made no reduction when you put the line in in Tampa?

A. No, sir, because that can, as I explained this morning, in tin plate a ne, it was four cents a thousand lower than the $9.68 price for the 202 x 312.

Q. But you made no reduction on it?

A. No, sir, we made no reduction.

Q. When did you make that trip to Texas to see the Engleman Gardens?

A. I believe that was in August 1939.

Q. Did you have a local manager there like Mr. Slayton is here?

A. At Houston—yes, sir.

[fol. 730] Q. What was his name?

A. Ivan W. Siekmann.

Q. Why did you not let him handle the situation?

A. The reason why was because we had this competitive situation in the picture to contend with and we did not feel that he was well-enough versed to handle that himself.

Q. Did you authorize him to make the price of $9.68 before you went down there?

A. I cannot answer that. I do not know without consulting our files and I do not have that correspondence here.

Q. Who is the Assistant to the General Manager of Sales of Packers Cans?

A. L. D. Jenkins.

Q. He has that Department?

A. Yes, sir.

Q. He is your Assistant?

A. He is Assistant to the General Manager of Sales?

Q. And you are the General Manager of Sales?

A. That is correct.

Q. I hand you a letter and ask you if that is Mr. Len Jenkins' signature?

A. Yes, sir.

Mr. Fowler: I will offer that letter in evidence and ask that it be marked Defendant's Exhibit F-21.

Mr. Allison: No objection to its being introduced out of order but I think it is foreign to the examination of the issues here.

(Thereupon the letter was read to the Court—and admitted in evidence as Defendant's Exhibit F-21, which exhibit is in words and figures as follows:)

[fol. 731] DEFENDANT'S EXHIBIT F-21

American Can Company
New York Central Bldg.
230 Park Avenue, New York

L. D. Jenkins, Ass't to General Manager of Sales

September 13, 1939.

Mr. Edwin Smalle, Bruce's Juices, Inc., 205 E. 42 Street, New York, New York.

DEAR ED:

Several weeks ago you informed me that there was a possibility of your company's transferring about 40% of the operations on small juice cans, (grapefruit) namely, 202 x 300 (4½-oz.) and 202 x 314 (6-oz.) lithographed cans, to the Santa Rosa, Texas, plant. At that time you felt that you would be in a position

to let me know something definite about this the first part of October. I am informed by our Central District office that if they are not notified before that time, it will probably mean that our New Orleans factory would not be in a position to begin manufacture of these cans until probably right after January 1. This is because it will be necessary for us to manufacture height change parts for these cans and it will take at least eight weeks to do this job alone.

Could you possibly give me some definite information at this time since I am sure that you would probably want to begin packing these sizes sometime in December. I will appreciate it very much if you can give me some immediate word as to a decision or just about when we can expect the necessary information.

Very truly yours, (signed) L. D. Jenkins, Asst. to General Manager of Sales.

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Mr. Fowler:

Q. Now, when Bruce's Juices was considering transferring 40% of its operations to Texas on the small juice, in Sept. 1939, you and the Sales Department did not inform them that you were making a reduction in the 312 can that they had been using prior to that time, did you?

A. I don't think Bruce's Juices ever went through with their plan, if they had any plan.

[fol. 732] Q. Did you or not notify Bruce's Juices that you reduced your price?

A. We did not because Bruce's Juices were not using it.

Q. You do not know whether they were or not if they got that price of the——

Mr. Allison: That is objected to as argumentative.

The Court: Objection sustained.

Q. You sold the Morgan Packing Co., Austin, Indiana, the 312 can in 1940 which was made in Indianapolis and equalized their freight to Austin, Indiana, did you not?

A. We sold the 202 x 312 plain can to Morgan Packing Co. at $9.68 a thousand for the plain can, f. o. b. Indianapolis, freight equalized with Austin.

Q. What was the general competitive situation in Texas to which you referred which required you to make that trip down there?

A. As I mentioned previously, there was a can manufacturing Company—I am unable to say right at this time the name of it—but I believe it was the Cameron Machine Co.—and Mr. McDaniel was negotiating with this Company for the purchase of a line of equipment on which to manufacture his requirements of the 202 x 312 cans, and this representative of this Can Manufacturing Equipment Co. had pointed out that he could make his cans. He told Mr. McDaniel that he could make his cans at a price which Mr. McDaniel told me was very much lower than the—after I got down there—he told me it was very much lower than the price that I mentioned after I had arrived.

Q. What was the price you mentioned after you had arrived?

[fol. 733] A. I cannot remember. I would not want to attempt it. Whether or not he told me definitely I have forgotten.

Mr. Allison: You mean that Mr. Nugent mentioned on his can or the other man?

Mr. Fowler: I want to know just what Mr. Nugent said when he got down there and what price Mr. Nugent mentioned to Mr. McDaniel.

A. He possibly mentioned it to me but their price did not mean anything. I went down there to try to hold the can with our price but not at the competitive price.

Q. But you did not manage to hold it at the price it was before you went down there?

A. Yes sir, I managed to hold the business.

Q. But the price was $10.00 and something?

A. $10.06 a thousand, but by placing it in our Houston factory we saved some freight on the tin plate, and freight on the cans, which amounted to, as I remember, 25¢ per thousand, and then the difference in the tin plate in the 202 x 312 can and the 202 x 314 can was sufficient so that I could make the other 13¢, and could go beyond that.

Q. But you had been charging $10.06 and there was not any difference between the 312 in New Orleans and the 312 can in Houston?

A. No sir. But, we had the $10.14 f. o. b. Tampa.

Q. What did that have to do with the lowering of the price of the 312 can in Houston?

A. The comparison of the 312 was higher than the 314 can.

Q. So you cut the price to give them advantage of the 314 can?

A. No sir, not an advantage.

Q. To assist them in their price on the 314 can?

[fol. 734] A. No sir. I thought it was only fair to that Company, to be more nearly in line with the price that we had in Tampa for the 312 can.

Q. And that is why you made that reduction?

A. That is true.

Redirect examination.

Mr. Allison:

Q. You also were advised of the competitive situation, I believe you stated.

A. Yes sir.

End of Witness

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Thereupon the Plaintiffs further to maintain the issues on their behalf, in rebuttal, then and there produced and caused to be sworn as a witness LEONARD B. SMITH who testified as follows:

Direct examination.

Mr. Allison:

Q. Please state your name?

A. Leonard B. Smith.

Q. Place of residence and occupation?

A. 911 Park Avenue, New York City. I am a lawyer and General Counsel for the American Can Co.

Q. You are a member of the Bar of the State of New York?

A. Yes sir.

Q. How long have you been the General Counsel for The American Can Co.?

A. Ten years.

Q. Were you occupying that position at the time the Plaintiff's Exhibits Nos. 2 to 14, inclusive, were compiled?

A. Yes sir.

Q. Did you participate in the preparation of these schedules and these statistics?

[fol. 735] A. I participated in the preparation of this plan that was embodied in the book—Plaintiff's Exhibit 2 and also in the preparation of the Can Contracts containing Sales Discounts that have been introduced.

Q. Those are Plaintiff's Exhibits 2 to 28-A?

A. Yes, sir.

Q. Mr. Smith, will you please state in your own words the facts which entered into the preparation of those exhibits and the existing situation at the time they were prepared.

Mr. Fowler: To which we object, if the Court please, because it states reasons and motives; it calls for opinion testimony, and states why in his opinion certain things were done, when the only thing that has any bearing on this case is what was done, and the testimony would be improper, incompetent and irrelevant.

The Court: I will let him anwer the question.

A. I can state what was done.

Q. That is what I have asked.

A. When the Robinson-Patman Law was passed it was apparent to the officials of The Company that all of the packers cans contracts with the Company would have to be cancelled. Those contracts contained certain unit discounts and allowances to their customers that were permissible under the Clayton Act but could not be sustained under the requirements of the Robinson-Patman Law. And the Officials of the Company then set about to devise a system of quantity discounts that could be sustained by proof which would comply with the requirements of the Robinson-Patman Law.

Mr. Gordon Kellog, who is the Vice-President in charge of sales, made an estimation that, although there was no difference in the cost of manufacture of the cans, there was a [fol. 736] saving in the sales expense to the large customers which he estimated would run as high as 5%. That was merely an estimate that he made from a knowledge of the business because previously no account of the sales expense of the Company had ever been kept, divided up among the different customers or classes of customers, but the sales expense was kept in a single amount for the entire Company.

In order to make any scale of quantity discount legal under the Robinson-Patman Law it was necessary that there should be proff that there was a saving in sales expense equal to the amount of the discount due only to

quantities of purchases; and it was recognized that there might be differences in sales expense due to an infinity of different reasons, and they all had to be eliminated except the difference that was due to the difference in quantity alone; so that, a comparison between the expense of selling to individual customers was of no value at all because there was no proof of how much of it was due to the difference in quantity; so then it was finally decided that if all of the packers can customers of the Company were divided into three classes consisting of the largest customers, the medium sized ones, and the smaller ones, that is, the division made solely on the basis of the annual volume of sales so that all kinds of customers, indiscriminately, good, bad and indifferent, were thrown into these three classes without any dividing line except solely the dividing line caused by the difference in volume of purchase, then, if it appeared that a detailed accounting of costs showed that there was a difference in sales expense between those three classes, and that this difference persisted month after month and year after year, then that difference must be due to the difference in quantity of purchases because there was no other difference between the classes; all the other differences causing differences in sales costs would be washed out. It was considered that, in the number of packers cans purchasers which was fourteen or fifteen hundred, it was large enough to accomplish that washing out of all the differences of costs except differences that were caused by the difference in volume.

[fol. 737]

And I worked on this with the officials of the Company for several months and we got up this system of cost accounting, which is embodied in this little book "Packers Cans Sales—Roadmen's Expense", in which there was no attempt to keep account of cost of sale to any individual customer, and all of the elements that went to make up the sales costs were segregated and kept account of in the manner shown in this book divided between the three classes of customers, the largest customers, the medium sized and the smaller.

That system of cost accounting was put in effect April 1, 1937. In the meantime, new contracts had been put out and signed with the customers containing the scale of quantity discounts which is in them now, based on the estimates that I have spoken of, that the officials had made with-

out really any basis except their own knowledge of the business.

In order to induce customers to sign these new contracts there was made a flat reduction of eight percent in the price of the sanitary cans, so as to induce the cancellation of all of the old contracts and the acceptance of the contracts containing the new scale of quantity discounts.

This cost accounting was kept month by month, and then at the end of each year when the annual volume of sales was known and the quantity discounts were calculated, then a statement was made up to see whether the saving approved in the cost expenses was equal to the amount of the discounts [fol. 738] that were paid, and it proved that the saving was equal and a little bit more.

The result of this cost accounting showed two things?

1. It showed that the saving in the selling expense to the customers in the very highest bracket, what they call Class "A", I think, was a little more than 5% discount which they received. It varied slightly but I think it was always between five and six per cent.

2. It showed that the total aggregate saving of sale expense to all of the customers who received discounts was greater than the total aggregate of all of the discounts paid.

That system was continued for, I think, four years and nine months. It involved a very laborious burden on the sales force and the accounting force, and took up a great deal of the salesmen's time and a great deal of accounting work, but the result of it as shown in these statements are offered in evidence, and while these percentages varied slightly up and down from time to time, they remained to all intents and purposes substantially permanent and we considered that they proved beyond the possibility of dispute that the saving of sales expense which they showed was due to the difference in the quantity of purchases because there was no other difference between these three classes of customers.

Cross-examination.

Mr. Fowler:

Q. Mr. Smith, I believe you stated that the American Can Co. recognized that it could not give any discounts that it could not justify in savings. Is that correct?

A. Not only that, I said it could not give any discounts that it could not justify under the Robinson-Patman Law. It was not every kind of a saving that would justify a dif- [fol. 739] ference in price or discount under the Robinson-Patman Law. There were only two kinds. The Robinson-Patman law specified difference in methods, and there might be an infinity of other reasons difference of cost but the only thing that would justify a difference in price under the Robinson-Patman Law would be a difference in the method and in the quantity in which the goods were sold and delivered."

Q. In other words these discounts here in your Contract are prima facie illegal unless, as a matter of fact, you can justify those discounts in costs either from the manufacturers sale or delivery resulting from the different method or quantities in which such commodities are to such purchases sold and delivered?

A. Yes, sir.

Q. And each time that is attempted the burden is on you to justify those discounts, is it not?

A. Yes sir, I think so.

Q. You refer to small customers as the "C" group, and the way you classified them, they were all customers who buy less than $500,000.00 of cans a year?

A. Yes, sir.

Q. The way you classified them?

A. Yes, sir.

Q. Under your plan, take for example the California Packing Corporation, with a factory at Tampa, another one in Utah, two or three in California, and one in Ohio, it is your contention that you can add all those purchasers together in order to get the total of purchases to place them in one of these brackets placed in your contract.

A. That is proved by the way we kept the accounts.

Q. That is the way you did it?

A. Yes, sir.

Q. When these costs come in who allocates them on types that are between "A", "B" and "C" accounts?

A. That is all done in this book Plaintiff's Exhibit 2. It shows the way in which the road men have to keep account of their time so that their time can be divided up to [fol. 740] make the different classes and the book describes how it is allocated between the different classes, and that is

all done then in the Auditor's Department, I mean the work of writing the books.

Q. Who says whether a special item of expense that comes in that there may be some doubt about goes into which one of these accounts, who passes on that?

A. The Salesmen have to keep a daily record of the time that he has spent and no one questions that. He has to write down every day how much time he spent on customers in each of these three brackets.

Q. And he is the one that allocates between the different customers?

A. He allocates his own time, yes sir.

Q. Could a man selling asparagus in California, buying cans from you, get together with a canner of citrus in Florida and purchase together to get in one of these classes?

A. No sir, we do not permit any co-operative buying associations that do not operate canneries, we do not allow them any quantity discount.

Q. Could you tell me why, in this little booklet—"Plain-rigg's Exhibit No. 2, you charged commission to all those in Class "C" when most of them, for example those in Florida do not have any commission charged against their purchases?

A. Well, it was a sales expense.

Q. In other words, if the commission is charged against the "C" customer in Ohio, it is put in the general pot and charged against all the customers including those in Florida?

A. We are not allowed to make any difference in price. We have to charge all the same whether they were brokers or not, under the Robinson-Patman Law.

Q. You are allowed to make allowances for actual savings?

[fol. 741] A. Only for savings due to the two causes that I mentioned or the different methods or the quantities.

Q. Then if you paid commissions to the small canners elsewhere, it is charged against all small canners including those in Florida where there is no commission paid?

A. It is charged against that Class, not against any individual canner at all, against the Class as an expense of doing business with the customers in the small class. All of the sales expense has to be put into this account and it is sometimes necessary to do business with small canners by means of brokers but I do not think it ever is necessary to do so with large customers. That is sales expense and

it has to be put in the class of customers in which it is incurred.

Q. In other words irrespective of how many or how few times your salesmen have to call on an individual customer or how few or how often your mechanics or whatever you call them, call on your customers to work on his closing equipment or machinery, he is put in the same class irrespective to what his personal costs to you or your Company are.

A. Those are differences of expense for which the Law does not allow difference in price, but the only difference in cost for which any difference in price is justified, is a difference in expense that is due to method or to quantities and we were keeping account of the difference that was due to the different quantities, and that is all. And, as I have explained, the only way that we knew of, and the only way that I know of or ever heard of to keep account of a difference in cost due only to quantities or sales is to classify the customers according to the quantity and see what is the difference between those different classes because then all other causes of difference in expense are indiscriminately [fol. 742] thrown in together and they wash each other out.

Q. In doing that you classified the little customers, including Alaska, Hawaii and all other States where you do business?

A. All of the customers that come within the quantity classification. I do not think that applied to customers outside of the United States. I do not recall about that.

Q. You would not say that is not true?

A. I do not recall that. This is six or seven years ago, but I remember very well in a general way when it was done, but I do not recall whether it included any customers outside of the United States.

Q. But there are parts of the United States where there are a large number of small canners, are there not?

A. Yes, sir.

Q. What was the total sales cost in relation to the total sales; that is the percentage of the total sales costs in connection with the total sales of the American Can Co.?

A. That is shown in the exhibit. It varied from time to time. I don't know just what it was.

Q. I will ask you if it was not approximately 2%?

A. I could not say that. I do not remember the figures.

Q. Would you say that is not correct: look at your exhibits there: could you tell us that?

A. These Exhibits 5 to 9 show the total sales expense *expense* each year but I don't know what the total sales were for those years.

Q. You divide five, I think, into the nineteen million and arrive at 1%: in other words I think we contend that they are actually 2% although they allow as much as 5% [fol. 743] to a large number of their customers?

A. I do not know. I think that the total sales expense was more than two per cent but of course there might be a saving in the higher brackets more than the average of the sales expense for the entire business, because most of that expense might have been in the lower brackets so that a saving in the higher brackets might have been more than the average of the entire sum.

The Court: Now what I want to know is if this is all of the testimony that you want to take from any witnesses that they have got or if they want to take any testimony of your witnesses or otherwise, if both sides are closed: both sides.

Mr. Fowler: We are closed taking the testimony now. If the Court has over-ruled all of the questions which we asked in New York and which were certified to the Court, and those Exhibits are still subject to the objections which were made in New York——

(Thereupon after argument of Counsel the Court stated:)

The Court: As I have said heretofore, the way he explained it, he puts all of the sales to the California Packing Corporation and lumps them into one sum in order to determine what discount they are entitled to. I am not going into the question of whether that is a proper way to do it or not because if that is the way he has been doing business as a rule I cannot see how it hurts Mr. Bruce or anybody else is hurt by it.

This question is not one that ought to be before this Court as I have had occasion to remark but it ought to have been before the Federal Trades Commission on the question [fol. 744] of whether or not this system that is set up here is legal under the Robinson-Patman Act. It hasn't got any business in this Court because we have not the facilities to investigate all those things and we are not the Body authorized to investigate whether or not their system of

doing business is legal under the Robinson-Patman Act. As I understand it the question of whether or not this system of doing business is legal or not is vested in the Federal Trades Commission.

The Court: Q. Is not that what the Law says?

Mr. Smith, the Witness: The law mentions prosecutions or investigations before the Federal Trades Commission. It has several paragraphs about that.

The Court: That is what has been going on for several years and it seems to me like it would be as much to the interest of the American Can Co. to bring that question there as well as the customers and let them pass upon whether or not that is the legal way of doing business. It seems to me that it would be beneficial to the Company to have it determined there.

Mr. Allison: In view of the Court's remark may I ask the witness, Mr. Smith, one question?

Q. Mr. Smith, was the Federal Trades Commission advised of this system of discount sales at the time it was set up?

Mr. Fowler: Objected to as immaterial and irrelevant and we have no way to rebut it.

The Court: Objection sustained.

(Thereupon the testimony from all parties herein was closed.)

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[fol. 745] In Circuit Court of Hillsborough County

On the 15th day of December, 1943, in Cause No. 23454-L Stipulation of Facts was entered into between counsel for the parties and filed December 15, 1943, and is in words and figures as follows:

Stipulation of Facts

It Is Hereby Stipulated and Agreed by and between the undersigned counsel of record for the respective parties hereto, that the note of $12,000.00 described in the first count of the declaration, was renewal of an original note dated October 1, 1941; which original note covered purchases of cans by defendant from plaintiff on and after June 6, 1940.

It Is Further Stipulated that the note for $19,799.97 was renewal of former notes given over a period of time, and represented an indebtedness due by defendant to plaintiff prior to August 18, 1939.

It Is Further Stipulated and Agreed that the note for $7,039.25, described in the third count of plaintiff's declaration, covered indebtedness due by defendant on May 26, 1939.

John M. Allison, Attorney for Plaintiff; R. W. Shackleford and Cody Fowler, Attorneys for Defendant.

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[fol. 746] In Circuit Court of Hillsborough County

On the 15th day of December, 1943, in Cause No. 23569-L Stipulation of Facts was entered into between counsel for the respective parties, and filed December 15, 1943, and is in words and figures as follows:

Stipulation of Facts

It Is Hereby Stipulated and Agreed by and between the undersigned respective counsel for plaintiff and defendant in the above cause, that the note for $75,000.00 described in Plaintiff's declaration, was a renewal of former notes which covered an indebtedness due by defendant to plaintiff prior to August 18, 1939.

John M. Allison, Attorney for Plaintiff; R. W. Shackleford and Cody Fowler, Attorneys for Defendant.

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In Circuit Court of Hillsborough County

On the 29th of December, 1943, Order on Pleadings and Pre-Trial Conference in Case No. 23454-L was entered and filed December 29, 1943, and recorded in Minute Book 87, page 286, and is in words and figures as follows:

Order on Pleadings and Pre-Trial Conference in Case No. 23454-L

This cause coming on to be heard on pre-trial conference under the order of this court of the 22nd of January, 1943, and the court having considered the evidence of the parties

and the record in said cause, together with the admissions [fol. 747] of counsel, finds:

(1) It is undisputed in the evidence and admitted by the counsel for the defendant that the notes described in the declaration were duly executed and delivered by the defendant to the plaintiff to evidence the indebtedness for goods sold and delivered by the plaintiff to the defendant prior to the execution and delivery of the said notes.

(2) It is further agreed that all of said notes were past due at the time of the filing of the suit and plaintiff is entitled to recover the amount thereof in the event of the failure of the defenses pleaded in the defendant's pleas.

(3) It is further agreed by counsel for the parties that in the event that the plaintiff secures a judgment in this case a reasonable attorney's fee of fifty ($50.00) Dollars, and ten per cent (10%) of the principal and interest recovered in the suit, is a reasonable attorney's fee for plaintiff's attorney for his services in the suit.

The defenses interposed by the pleadings are:

(1) Conditional delivery of the notes and that the condition on which delivery of the notes was made has not yet transpired.

(2) That the notes are illegal and unenforceable because the transaction in which they were executed were unlawful because plaintiff violated the Robinson-Patton Act, U. S. C. A., Title 15, Section 13.

No other defenses are offered, nor is it contended that the record in the cause discloses that any other defenses might be interposed.

It is admitted by counsel for defendant, in open court, that the agreement relied on by the defendant to show the conditional delivery of the notes was made, if at all, in April, [fol. 748] 1940, at New York, in conversation with the various officers of the plaintiff, and Mr. Bruce for the defendant. As to the contention that there was a conditional delivery of the notes the evidence fails to disclose that the notes were conditionally delivered. The evidence goes no further than that the defendant strenuously insisted on an adjustment for a claim of discrimination in violation of the Fed-

eral Act but falls far short of showing that the plaintiff ever agreed to such adjustment. To the contrary the record shows that no such agreement was ever made between the parties. The record, therefore, discloses that defendant has no defense on the ground of conditional delivery of the notes.

As to the defense of illegality of consideration or unlawfulness of the notes under the Federal Statutes, herein above mentioned, I am of the opinion that under decisions of the Supreme Court of the United States such defense cannot be offered in a suit to collect the purchase price of merchandise sold and delivered and affected by the provisions of that act. The act itself prescribes the only remedies available to persons affected by its violation and no other method or relief is to be had. The contract of sale was not under these decisions Malum in se but Malum prohibita only.

I am, therefore, of the opinion that all questions of fact and law on which the rights of the parties depend are settled in favor of the plaintiff and under Hillsborough County vs. Sutton, 8 Southern 2nd, 401, this court should enter judgment in its behalf on the pleadings and facts disclosed by the record in this cause.

It Is, Therefore, Ordered, Adjudged and Decreed that counsel for the plaintiff is directed to prepare judgment [fol. 749] in favor of the plaintiff in accordance with the findings of this order and upon notice to counsel for defendant to present said judgment to this court for its signature.

Done and Ordered at Tampa, Florida, this the 29th day of December, A. D. 1943.

L. L. Parks, Judge.

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[fol. 750] In Circuit Court of Hillsborough County

On January 5, 1944, Order Consolidating and Merging Causes No. 23454 and No. 23569-L Into a Single Suit was filed Jan. 5, 1944, in Case No. 23569-L and recorded in Minute Book 87, page 309, and is in words and figures as follows:

ORDER CONSOLIDATING AND MERGING CAUSES No. 23454 AND No. 23569-L INTO A SINGLE SUIT

This cause coming on this day to be heard upon the joint application and request of counsel of record for plaintiff and defendant, in open Court, for the consolidation of the above styled cause with Cause No. 23454-L, pending in this Court, between the identical parties plaintiff and defendant, and to merge the said consolidated causes into a single suit, and counsel for plaintiff and defendant being present before the Court:

And it appearing, and the Court finding that each of said causes is upon claims or demands arising out of the same transactions or occurrences between the same parties, and that heretofore, on August 10, 1943, this Court consolidated said causes for the purpose of pre-trial conference;

And it now appearing, and the Court finding that the consolidation of said causes, and merging of the consolidated causes into a single suit, is desirable and proper, and in accordance with the statutes in such cases made and provided;

It is therefore Considered, Ordered and Adjudged that the above styled cause be, and the same is hereby consolidated with Cause No. 23454-L, now pending in this Court, and said consolidated causes are hereby merged into a single suit to proceed henceforward as No. 23454-L, and that the pleadings heretofore filed in this cause shall be taken and considered as consolidated and merged with, and as a part of the court files of Cause No. 23454-L.

(fol. 7514) It is further Ordered that the ad dammum clause of Cause No. 23454-L be, and the same is hereby amended and fixed at $150,000.00.

It is further Ordered that this consolidation and merger is hereby made and ordered effective, nunc pro tunc, as of August 10, 1943, and the order of this Court entered December 29, 1943, in Cause No. 23454-L, shall extend to, govern, and be applicable to such consolidated and merged causes.

It is further Ordered that the Clerk of this Court shall record this order herein, and shall enter the same on the progress docket of each of said consolidated causes, showing thereon the minute book and page where this order is recorded.

Done and Ordered at Tampa, Florida, this 5th day of January, A. D. 1944.

L. L. Parks, Circuit Judge.

[fol. 752] IN CIRCUIT COURT OF HILLSBOROUGH COUNTY

On the 5th day of January, A. D. 1944, Final Judgment in Consolidated Cases was entered and filed Jan. 5, 1944, in case No. 23454-L and recorded in Minute Book 87, page 311, and is in words and figures as follows:

FINAL JUDGMENT IN CONSOLIDATED CASES

Cause No. 23569-L and cause No. 23454-L having heretofore by order of this court been consolidated and merged into a single suit, as Case No. 23454-L, and said consolidated and merged causes now coming on to be finally heard as Case No. 23454-L, wherein American Can Company, a New Jersey corporation, is plaintiff, and Bruce's Juices, Inc., a Florida corporation, is defendant, upon plaintiff's application for entry of final judgment, pursuant to, and as ordered by this Court's Order On Pleadings and Pre-Trial Conference, entered herein December 29, 1943, and counsel for plaintiff and defendant being present in person before the Court, in accordance with the findings and determination of the aforesaid order, it is hereby

Considered, Ordered and Adjudged that the plaintiff, American Can Company, a New Jersey corporation, do have and recover of and from the defendant, Bruce's Juices, Inc., a Florida corporation, the following amounts due upon the promissory notes herein sued upon, to-wit:

1. Upon the note, dated March 30, 1942, for $12,000.00; for principal, $12,000.00; for interest from March 30, 1942, to this date, $1,070.56; for a reasonable attorney's fee for plaintiff's atterney, $1,357.05; or a total of $14,427.61.

2. Upon the note, dated February 23, 1942, for $19,799.97; for principal $19,799.97; for interest from May 25, 1942, to this date, $1,611.50; or a total of $21,411.47.

3. Upon the note, dated February 23, 1942, for $7,039.25; [fol. 753] for principal, $7,039.25; for interest from May 25, 1942, to this date, $573.29; or a total of $7,612.54.

4. Upon the note, dated December 31, 1941, for $75,000.00; for principal, $75,000.00; for interest from November 30, 1942, to this date, $4,187.81; or a total of $79,187.81.

5. For plaintiff's costs herein taxed upon plaintiff's motions, $159.17.

That the plaintiff, American Can Company, a New Jersey corporation, do have and recover of and from the defendant, Bruce's Juices, Inc., a Florida corporation, the total sum of $122,798.60 as aforesaid, for all of which let execution issue, and that this judgment bear interest at five per cent (5%) from this date until paid.

Done and Ordered at Tampa, Florida, this 5th day of January, A. D. 1944.

L. L. Parks, Circuit Judge.

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[fol. 754] In Circuit Court of Hillsborough County

On the 5th day of January, 1944, Stipulation and Order for Stay of Judgment was filed and recorded in Minute Book 87, page 307 in words and figures as follows:

Stipulation

Whereas, counsel for defendant has announced in open Court that defendant will appeal from the final judgment entered in this consolidated cause on January 5th, 1944, and that incident thereto, J. Adams Bruce, President of defendant corporation, will be required to go to New York City to arrange for the obtaining and posting of a proper supersedeas bond, as required by statute, to stay said final judgment pending the decision of the Supreme Court of Florida;

And Whereas, reasonable time will be required for defendant to complete arrangements for such supersedeas bond, and defendant has requested plaintiff to withhold levy of writ of execution to permit the obtaining and posting of such bond;

Now, Therefore, in consideration of the premises and of defendant's assurance that such appeal will be taken and such supersedeas bond will be obtained and posted, plaintiff stipulates and agrees that it will not direct the writ of execution issued on the final judgment in this consolidated cause, to be levied on the property of the defendant, for thirty days from the date of this stipulation;

And defendant stipulates that within thirty days from the date of this stipulation it will make and enter its notice of appeal herein to the Supreme Court of Florida, and will obtain and post its supersedeas bond, as required by statute

and rules of Court. The failure or default of defendant to take such appeal and make and post such bond within such time, shall terminate and render null and void this stipula-
[fol. 755] tion at the expiration of said period of thirty days.

Dated at Tampa, Florida, this 5th day of January, A. D. 1944.

John M. Allison, Attorney for Plaintiff. Cody Fowler, Attorneys for Defendant.

ORDER

The Above and Foregoing Stipulation having been presented to this Court by counsel for the plaintiff and defendant, and the Court having read and considered the same, such stipulation is hereby approved, and made a rule of this Court.

Done and Ordered at Tampa, Florida, this 5th day of January, A. D. 1944.

L. L. Parks, Circuit Judge.

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[fol. 756] IN CIRCUIT COURT OF HILLSBOROUGH COUNTY

On the 3rd day of February, 1944, Notice of Appeal was filed by defendant, Feb. 3, 1944 in case No. 23454-L, and recorded in Minute Book 87, at page 393, in words and figures as follows:

NOTICE OF APPEAL

The defendant, Bruce's Juices, Inc., a Florida corporation, takes and enters its appeal to the Supreme Court of Florida to review the final judgment of the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, bearing date of the 5th day of January, 1944, entered in the above cause and in cause No. 23569 Law, which said actions were, by stipulation and order of Court, consolidated for trial, and which said final judgment was entered in said actions and recorded in the records of the said Court in Circuit Court Minute Book 87 at page 311, and all parties to said causes are called upon to take notice of the entry of this appeal.

Cody Fowler, Shackleford, Farrior & Shannon, R. W. Shackleford, by Cody Fowler, Attorneys for Bruce's Juices, Inc., a Florida corporation, Defendant.

[fol. 757] IN CIRCUIT COURT OF HILLSBOROUGH COUNTY

On the third day of February, 1944, Order granting Stay or Supersedeas was filed and recorded in Minute Book 87, at page 389, in words and figures as follows:

ORDER GRANTING STAY OR SUPERSEDEAS

This cause coming on to be heard upon the motion of the defendant made in open court for a stay of supersedeas of further proceedings in this cause and to determine the amount and conditions of the bond to be given and the court being advised in the premises,

It Is Therefore, Ordered, Adjudged and Decreed:

1. The appeal filed in this cause by the defendant, Bruce's Juices, Inc., a corporation, from the final judgment entered herein on the Fifth day of January, 1944, shall operate as a supersedeas or stay of all further proceedings herein pending the determination of the said appeal upon the defendant giving, filing and having approved as hereinafter provided a bond payable to the plaintiff in the sum of One Hundred Thirty Thousand ($130,000.00) Dollars, conditioned to satisfy the said final judgment in full, including costs and interest in event the said appeal be dismissed or the said final judgment be affirmed.

2. The said bond shall have two good and sufficient personal sureties or one surety company authorized to do business in the State of Florida.

And a bond in proper form properly executed as hereinbefore set out for said amount as hereinbefore required being presented herewith, same is hereby approved and all further proceedings be and the same are hereby stayed and suspended pending the determination of said appeal.
[fols. 758-759c] Done and Ordered at Tampa, this 3rd day of February, A. D. 1944.

L. L. Parks, Judge.

Supersedeas bond on appeal for $130,000.00 approved and filed Feb. 3, 1944, omitted in printing.

[fol. 760] In Circuit Court of Hillsborough County

On the 11th day of February, 1944, Assignments of Error were filed in Cases No. 23454-L and No. 23569-L which are in words and figures as follow-:

Assignments of Error

Now comes the defendant, Bruce's Juices, Inc., a Florida corporation, by its undersigned attorneys, and assigns the following error to be asserted and relied upon by it on its appeal in this cause:

1. The Court erred in entering Final Judgment which was entered in these causes on the 5th day of January, 1944, which said judgment was filed in the office of the Clerk of the Circuit Court in and for Hillsborough County, Florida, in Minute Book 87, at page 311.

2. The Court erred in holding as a matter of law that the defense of illegality was not available to defendant.

3. The Court erred in holding that the defendant was not entitled to set up as a defense that the notes upon which the action was based were executed pursuant to a contract which was in violation of an Act of Congress.

4. The Court erred in holding, in effect, that the interposition of a defense that a contract is in violation of the Federal Anti-Trust Statutes constitutes a remedy under such Statutes and is therefore barred because the remedies provided by the Federal Statutes are exclusive.

5. The Court erred in refusing to submit to the jury the effect of the plaintiff's violation of the Federal Anti-Trust Laws.

6. The judgment entered was erroneous in that the Court thereby permitted the plaintiff to effect recovery upon a contract which was expressively prohibited by law.

7. The entry of judgment at pre-trial conference was without authority in law and in violation of the fundamental [fol. 761] right of the defendant to a trial by jury of the issues presented by the pleadings.

8. The Court erred in holding that there was no evidence sufficient to go to the jury upon the defense of conditional delivery.

Cody Fowler, Shackleford, Farrior & Shannon, by R. W. Shackleford, Attorneys for Defendant, Bruce's Juices, Inc.

STATE OF FLORIDA,
County of Hillsborough.

Before me, the undersigned authority, on this 11th day of February, A. D. 1944, personally appeared Louise H. Rambo, who being first duly sworn, deposes and says she is a stenographer in the offices of Shackleford, Farrior & Shannon, of counsel for defendant; that on this date she deposited a copy of the above and foregoing Assignments of Error in an official mail box in the City of Tampa, Florida, securely enclosed in an envelope with sufficient postage affixed thereto and addressed to plaintiff's attorney, Mr. John M. Allison, 305 Morgan Street, Tampa 2, Florida.

Louise H. Rambo.

Sworn to and subscribed before me date aforesaid.
Ida Bates, Notary Public. My commission expires April 16, 1947. (Notary's seal.)

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[fol. 762] IN CIRCUIT COURT OF HILLSBOROUGH COUNTY

On the 11th day of February, 1944, defendant filed Written Directions to Clerk which are in words and figures as follows:

WRITTEN DIRECTIONS TO CLERK

To the Honorable Chas. H. Pent, Clerk of the Circuit Court in and for Hillsborough County, Florida:

Pursuant to appeal to the Supreme Court of Florida entered by the defendant in the above entitled consolidated causes, you are hereby requested and directed to prepare transcript of record in said cause, and in making up said transcript of record, you are hereby requested to observe the following directions:

1. In Cause No. 23454-L recite the filing of plaintiff's Declaration and include in said transcript copy of said Declaration.

2. In Cause No. 23454-L recite the filing of defendant's Amended Pleas and include in said transcript copy of said Amended Pleas.

3. In Cause No. 23454-L recite the filing of plaintiff's Demurrer to Amended Pleas and include in said transcript copy of said Demurrer to Amended Pleas.

4. In Cause No. 23454-L recite the filing of plaintiff's Motion for Compulsory Amendment of Amended Pleas and include in said transcript copy of said Motion for Compulsory Amendment of Amended Pleas.

5. In Cause No. 23454-L recite the filing of Order Directing Pre-Trial Conference, recorded in Circuit Court Minutes Book 86, page 22, and include in said transcript copy of said Order Directing Pre-Trial Conference.

6. In Cause No. 23569-L recite the filing of plaintiff's Declaration and include in said transcript copy of said Declaration.

[fol. 763] 7. In Cause No. 23569-L recite the filing of defendant's Pleas and include in said transcript copy of said Pleas.

8. In Cause No. 23569-L recite the filing of plaintiff's Demurrer to Pleas and include in said transcript copy of said Demurrer to Pleas.

9. In Cause No. 23569-L recite the filing of plaintiff's Motion for Compulsory Amendment of Pleas and include in said transcript copy of said Motion for Compulsory Amendment of Pleas.

10. In Cause No. 23569-L recite the filing Order Directing Pre-Trial Conference and Consolidating Cause with Case No. 23454-L, for Purposes of Pre-Trial Conference, recorded in Minute Book 87, at page 32, and include in said transcript copy of said order.

11. Copy fully testimony taken on February 15, 1943, for pre-trial conference, and filed June 19, 1943.

12. Copy deposition taken on behalf of defendant on April 1, 1943, and filed June 19, 1943.

13. Copy deposition taken on behalf of plaintiff taken on July 22, 1943, and filed August 14, 1943.

14. Copy testimony taken on August 9, 1943, and filed on September 9, 1943.

15. Copy testimony taken on October 6, 1943 and filed on November 15, 1943.

16. Recite the filing of Order on Pleadings and Pre-Trial Conference in Case No. 23454-L on December 29, 1943, recorded in Minute Book 87, page 286 and include in said transcript copy of said Order.

17. Recite the filing of Order Consolidating and Merging Causes No. 23454-L and No. 23569-L into a Single Suit, Nunc Pro Tunc as of August 10, 1943, and to Proceed Hence-
[fol. 764] forth as Suit 23454-L, filed January 5, 1944, and recorded in Minute Book 87, page 309, and include in said transcript copy of said Order.

18. Recite the entry of Final Judgment in Consolidated Cases, on January 5, 1944, which was filed for record in the office of the Clerk of Circuit Court in and for Hillsborough County, Florida, in Minute Book 87, page 311, and include in said transcript copy of said Final Judgment.

19. Recite the filing of defendant's Notice of Appeal and include in the transcript copy of said Notice of Appeal.

20. Recite the filing of Order Granting Stay or Supersedeas filed on February 3, 1944, and recorded in Minute Book 87, at page 389, and include in said transcript copy of said Order.

21. Recite the filing of Supersedeas Bond by defendant and include in the transcript copy of said Supersedeas Bond.

22. Recite the filing of defendant's Assignments of Error and include in said transcript copy of said Assignments of Error, together with proof of service of copy thereof upon attorney for plaintiff.

23. Recite the filing of these Directions for making up said transcript of record and include in said transcript copy of said directions, together with copy of service of copy thereof upon the attorney for the plaintiff.

Cody Fowler; Shackleford, Farrior & Shannon, by R. W. Shackleford, Attorneys for Defendant.

STATE OF FLORIDA,
County of Hillsborough:

Before me, the undersigned authority, on this 11th day of February, A. D. 1944, personally appeared Louise H. [fol. 765] Rambo, who being first duly sworn, deposes and says she is a stenographer in the offices of Shackleford, Farrior & Shannon, of counsel for defendant; that on this date she deposited in an official mail box in the City of Tampa, Florida, a copy of the above and foregoing Written Directions to Clerk, securely enclosed in an envelope with sufficient postage affixed thereto and addressed to plaintiff's attorney as follows: Mr. John M. Allison, 305 Morgan Street, Tampa 2, Florida.

Louise H. Rambo.

Sworn to and subscribed before me the date aforesaid. Ida Bates, Notary Public. My commission expires April 16, 1947. (Notary's Seal.)

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IN CIRCUIT COURT OF HILLSBOROUGH COUNTY

On the 16th day of February, 1944, a plaintiff filed American Can Company's Written Directions to Clerk, which are in words and figures as follows:

AMERICAN CAN COMPANY'S WRITTEN DIRECTIONS TO CLERK

To the Honorable Chas. H. Pent, Clerk of the Above Styled Court:

The American Can Company, plaintiff in above styled cause and appellee on appeal, for further directions to the Clerk in making up the transcript of record in this cause, designates the following additional portions of the record, proceedings and evidence, to be included by the Clerk in the record on appeal:

1. Copy fully all exhibits filed with testimony taken February 15, 1943, and filed in cause on June 19, 1943.

2. Copy fully all exhibits filed with depositions taken on behalf of defendant April 1 and 2, 1943, and filed in cause June 19, 1943.

3. Copy fully all exhibits filed with depositions taken [fols. 766-767] on behalf of plaintiff July 22 and 23, 1943, and filed in cause August 14, 1943.

4. Copy fully all exhibits filed with testimony taken August 9, 1943, and filed in cause September 9, 1943.

5. Copy fully all exhibits filed with testimony taken October 6, 7, 11 and 12, 1943, and filed in cause November 15, 1943.

6. Copy fully testimony taken October 7, 11 and 12, 1943, and filed in Cause November 15, 1943.

7. Recite the filing and copy Stipulation of Facts filed in Cause No. 23454-L, filed December 15, 1943.

8. Recite the filing and copy Stipulation of Facts filed in Cause No. 23569-L, filed December 15, 1943.

9. Recite the filing and copy stipulation of counsel filed in consolidated cause No. 23454-L, on January 5, 1944.

John M. Allison, Attorney for American Can Company.

We, the undersigned attorneys of record for defendant in the above cause, acknowledge service of the foregoing written directions and receipt of a copy thereof, this February 16, 1944.

Cody Fowler, R. W. Shackleford, Attorneys for Defendant.

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[fol. 768] IN THE SUPREME COURT OF FLORIDA, JUNE TERM, 1944

EN BANC

HILLSBOROUGH COUNTY

BRUCE'S JUICES, INC., Appellant,

vs.

AMERICAN CAN COMPANY, Appellee

An Appeal from the Circuit Court for Hillsborough County.
L. L. Parks, Judge

Cody Fowler and Shackleford, Farrior & Shannon, for Appellant.

John M. Allison, Harry B. Terrell and Whitaker, Whitaker & Terrell, for Appellee.

OPINION—Filed October 20, 1944

THOMAS, J.:

An action on promissory notes culminated in a judgment for the plaintiff, and the defendant appealed.

Inasmuch as no question presented here for determination requires an analysis of the declaration, we shall proceed immediately to give a condensation of the pleas which appear to have given rise to the questions, four in number, which we must decide.

The first plea set out that notes were given for cans purchased from the payee by the maker and that the transaction was unlawful because the former "while engaged in commerce among the several states, directly and indirectly discriminated in price between different purchasers of * * * cans of like grade and quality, * * * sold for use and resale within the United States * * *" the effect of which "was substantially to lessen competition or tend to create a monopoly * * * and to injure, destroy and prevent competition with certain customers of * * * Defendant in violation of paragraph (a) of Section 13 of Title 15, United States Code * * *."

The second plea contained the allegations that the discrimination was "in favor of certain purchasers of * * * cans, and against the Defendant, a competitor of such purchasers, which cans were bought for resale in interstate commerce by furnishing to such purchasers * * * equipment for the closing of cans * * * without cost or charge * * * while charging rent for said equipment furnished to the Defendant, in violation of paragraph (e)" of the same section and title of the code.

In the third plea it was averred that there was discrimination by the allowance of discounts "to * * * purchasers over and above any discounts * * * available at the time * * * to * * * the Defendant and others similarly situated in respect of the sale of * * * cans, of like grade, quality and quantity, in violation of Section 13a" of the same title of the code. This plea is amplified by the statements that two companies in the same business of canning juices in Tampa and selling their products throughout the country as competitors of defendant were allowed a "large and discriminatory discount (5%)", not available to it and were relieved of delivery

charges which defendant was required to pay; that three other companies selling products in competition, but evidently not canning in the state, were likewise favored.

In the fourth plea it was charged that plaintiff sold cans in Texas for less than in Florida in violation of Section 13a, supra.

The appellant has observed in the brief that we need not, in our consideration of the controversy, make "any reference to the voluminous testimony set forth in the record inasmuch as the Trial Court took the position * * * the defense of illegality * * * was not available" and "correctly stated the gist of the defenses" as the illegality and unenforceability of the notes "because the transaction in which they were executed (was) unlawful because plaintiff violated the Robinson-Patman Act, U. S. C. A., Title 15, Section 13." The court concluded that the defense could not be presented for the reason that the federal statutes prescribe the only available remedy, and transactions in violation of these laws are not "Malum in se but Malum prohibita only."

The initial question challenges the ruling of the circuit judge that any remedy secured to the defendant by "the Sherman Anti-Trust Law as amended by the Clayton Act and as amended by the Robinson-Patman Act" could not be employed as a defense to a suit in the state court on the notes, but could only be asserted in an action for af- [fol. 769] firmative relief in a federal tribunal. In the second, third, and fourth questions, respectively, appellant asked: "Where the consideration of notes is dependent upon a transaction which is illegal, may recovery nevertheless be had * * * upon the theory that the notes constitute a distinct contract based upon a valid consideration?" and "Is a contract which is founded on a violation of a penal statute void even though it is not expressly declared void by the statute?" and "Was it necessary that the evil intended to be prohibited by the anti-trust statute be malum in se in order to render the contract, which was in direct contravention of the act, void and unenforceable?"

It should be pointed out here that there is an apparent discrepancy between the first question and the pleas we have digested, for the former relates to three acts of the Congress, i. e., the Sherman Anti-Trust Law and the Clayton and Robinson-Patman Acts, but the latter refers only

to Section 13a and paragraphs (a) and (e) of Section 13, Title 15, U. S. C. A. As we understand it, the laws cited in the pleas are parts of the Clayton Act as amended by the Robinson-Patman Act, and not parts of the Sherman Anti-Trust Law.

Bearing in mind the observation of the trial judge, conceded by appellant to be accurate, concerning the nature of the defenses, the statement of the appellant about the needlessness of any reference to the testimony, and the character of the questions posed, we conclude that the questions we must decide are actually two, i. e., whether (1) remedies furnished by the Clayton and Robinson-Patman Acts may become defenses in a suit on promissory notes to cover the purchase price of articles alleged in the pleas to have been sold in violation of those laws, and (2) the sale and the notes constituted separate transactions. We shall confine our discussion accordingly.

To avoid confusion we wish expressly to repeat that but three portions of the code are thus involved, Section 13a and paragraphs (a) and (e) of Section 13. They brand as unlawful transactions which by differentials in sales price, rebate, discount and the like result in discrimination between purchasers and tend to create monopolies and stifle competition.

Appellants open their challenge with a reference to a decision of the Supreme Court of the United States rendered in 1901, Bement and Sons v. National Harrow Company, 186 U. S. 70, 22 S. Ct. 747, 46 L. ed. 1058. Action had been instituted in the New York State Court for damages arising from breach of contract for the sale of farm implements, and the plaintiff had recovered. The court observed that the sole federal question involved, in the appeal from an opinion of the court of appeals affirming the judgment, was the validity of the contracts in view of the act of Congress designed to protect trade against unlawful restraint (Sherman Anti-Trust Law). The plaintiff had taken the position that only the Attorney General of the United States could bring an action under the statute, except that under one section of it (7) any person aggrieved might himself sue in a federal court. Reaction of the court to this contention was: "Assuming that the plaintiff is right so far as regards any suit brought under that act, we are nevertheless of opinion that anyone sued upon a contract (This action originated in the state court) may

set up as a defense that it is a violation of the act of Congress, and, if found to be so, that fact will constitute a good defense to the action." So when this decision was made it was definitely held that the defendant in a suit in a state court on a contract offending against the Anti-Trust Law could take advantage of the infringement by plea.

As late as 1942 this principle was again recognized by the United States Supreme Court when in Sola Electric Company vs. Jefferson Electric Company, 317 U. S. 173, 63 S. Ct. 172, 87 L. ed. 165, Mr. Chief Justice Stone wrote: "This Court has declared that anyone sued upon a contract may set up as a defense that it is in violation of the Sherman Act. E. Bement & Sons v. National Harrow Co." He added that if had been decided "in Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U. S. 227, 53 L. ed. 486, 29 S. Ct. 280, that a vendee of goods purchased from an illegal combination in pursuance of an illegal agreement, both in violation of the Sherman Act, can plead the illegality in defense to a suit for the purchase price."

The Supreme Court of New York in the case of Remington Rand v. International Business Machines Corporation, 3 N. Y. S. 2d 515, referred to the decision in the Bement case, supra, and announced the rule that a litigant in a state court could not rely upon the federal statute for affirmative relief, but could resort to it as a defense in an action on a contract executed in contravention of that law. While the decisions we have so far cited dealt with the Sherman Anti-Trust Law, the Supreme Court of New [fol. 770] York reiterated the rule in Stock and Son v. Jacobson, 18 N. Y. S. 2d 200, where the defense was predicated upon the Robinson-Patman Act.

The same general principle was applied in Pratt v. Paris Gaslight and Coke Company, 168 U. S. 255, 42 L. Ed. 458, when it was held that jurisdiction of a state court was not affected by an issue of the invalidity of a patent as an incident to a defense, although that court could have exercised no jurisdiction had the matter been presented to support a recovery.

The appellee insists that there are vital distinctions between the Sherman Anti-Trust Law on the one hand and the Clayton and Robinson-Patman Acts on the other that preclude application of the same rule relative to defenses

interposed under both. At the outset he contends that "contracts, conspiracies and combinations" under the former were inherently illegal at common law, while "discriminations in price, services, facilities, discounts, rebates, etc., were not unlawful at common law and * * * became so under Federal laws for the first time by adoption of the" latter. Upon turning to 41 C. J. page 99, given as authority for the first statement, we find the language: "All contracts, combinations, or agreements which create or *tend to create* a monopoly are unlawful at common law * * *," yet the words underscored are identical with the ones appearing in Section 13, supra, under which one of the pleas was filed.

Among authorities given for the text is our decision in Stewart et al. v. Stearns & Culver, 56 Fla. 570, 48 So. 19, where was written: "The validity or invalidity of an agreement that in operation *tends to restrain trade or to monopoly* is in general determined by the element of whether it is or is not injurious to the public. If injurious in any perceptible degree to any considerable portion of the public, the agreement is contrary to public policy, and will not be enforced." (Again we have supplied italics.)

We do not find such difference between the phraseology of the Sherman Anti-Trust Law and the subsequent two acts as would justify a ruling that violation of the one could be employed as a defense, but a violation of the others could not. When the real design of laws of this character is borne in mind, Stewart et al. v. Stearns and Culver, supra, any difference between the one and the other two becomes quite obscure. It is our view that the availability of the defenses was properly decided in Stock and Sons v. Jacobson, supra.

But the principal distinction, so the appellee urges, derives from the dissimilarity in the language used because in the Sherman Anti-Trust Law is the statement: "Every (such) contract * * * is * * * declared to be illegal," while Section 13a, supra, merely provides: "It shall be unlawful for any person * * * to be a party to, or assist in, any transaction * * * which discriminates * * *." So it is argued that by the former the contract itself is illegal; by the latter only the discriminations are unlawful. Here, too, we fail to find such a contrast as would furnish sound reason for contrary rulings as to relevancy of the defenses.

Appellee stresses the opinion in Connolly v. Union Sewer Pipe Company, 184 U. S. 540, 22 S. Ct. 431, 46 L. Ed. 679, as authority for his position, but we believe careful study will reveal an essential difference between the factual situation there and here. Briefly, according to the cited case, purchasers of pipe attempted to defeat recovery upon notes they had signed to evidence the purchase price, because the seller had combined with other dealers in restraint of trade. The court found that the "purchases by the defendants had no necessary or direct connection with the alleged illegal combination," and that the defenses for that reason were not tenable. We think the criticism of disconnection between the alleged violation and the obligation there is not present here where the amount of the notes, if the pleas be true, was affected by the transgression claimed and the purchase price for which notes were given was enlarged by reason of the discrimination. See Continental Wallpaper Company v. Voight and Sons Company, supra.

From the authorities it appears that the courts will not lend their aid toward the enforcement of a contract which will further the violation of the law. If for that reason recovery will be denied the plaintiff where he and the defendant may both be parties to the contract in contravention of the act, why would a defendant not a party, but a victim, be refused the same advantage? No reason occurs to us.

We reach the decision that the pleas, judging them by their substance, irrespective of any criticism as to their [fol. 771] form, were appropriate, and in arriving at this view we have not overlooked the fact that the action was based on promissory notes instead of the contract for sale itself. That the suit was not based upon the contract, but upon notes which evidenced amounts due under the contract does not, in our opinion, alter the situation. Embrey v. Jamison, 131 U. S. 336, 9 S. Ct. 776, 33 L. Ed. 172.

No necessity appears for further discussion of the questions we analyzed in the beginning. We must, however, decide what procedure should be followed by the trial judge to effectuate our judgment. We have said that appellants remarked the uselessness of referring to the transcript. There is sharp difference of opinion between counsel on the matter whether the court determined the controversy on the facts as well as the law. Despite this contention of the appellant, the appellee has repeatedly alluded to the testimony.

The judge recited that the matter was being heard upon "application for entry of final judgment." He adjudged that plaintiff recover, stating in detail the amounts due on the notes for principal and interest and also for attorney's fees and costs. A few days beforehand he had entered his "order on pleadings and pre trial conference," concluding with the direction to counsel for plaintiff to prepare a judgment. It is largely from the recitals in this order that we glean the extent of his consideration.

There is no dispute about the plaintiff's having proved its case, so we need decide whether the judge thought recovery was justified despite testimony in support of the pleas, they being inappropriate, or was warranted even if the testimony were taken into account, it being insufficient.

Aside from the defense of conditional delivery, which has been abandoned, he observed: "As to the defense of illegality of consideration or unlawfulness of the notes under the Federal Statutes * * * I am of the opinion that under decisions of the Supreme Court of the United States such defense cannot be offered in a suit to collect the purchase price of merchandise sold and delivered and affected by the provisions of that act. The act itself prescribes the only remedies available to persons affected by its violation and no other method of relief is to be had." He continued, as we have already quoted: "The contract of sale was not under these decisions Malum in se but Malum prohibita only." Then he concluded: "I am, therefore, of the opinion that all questions of fact and law on which the rights of the parties depend are settled in favor of the plaintiff and under Hillsborough County vs. Sutton, 8 Southern 2nd, 401 (130 Fla. 601) this court should enter judgment in its behalf on the pleadings *and fact* disclosed by the record in this cause." (Italics supplied.)

In the cited case was posed the question whether final judgment could be entered at the conclusion of a pre-trial conference, the procedure followed here. It appears to have been the ruling that such method was proper where material facts were not controverted. The court said: "If the conference progresses to the point of eliminating all questions of fact then the court may give judgment according to law on the facts before him." In the light of this rule, then, the judge must have felt that he should enter a judgment because of a situation where questions of fact had been eliminated and only a question of law remained for his

determination. Such a condition obtained so far as the plaintiff's case was concerned, but there is much in the record to indicate that issues of fact were not absent if testimony relative to the pleas were to be considered. In other words, the moment the issues raised by the pleas are contemplated disputed facts appear. We think this is readily apparent from appellee's brief, where much space is devoted to the evidence. For illustration, we find in it the statement that it was "within the province of Judge Parks, who heard the * * * testimony * * * and saw the demeanor of this witness, to apply to his testimony the rule: '*Falsus in uno; falsus in omnibus.*'" etc., referring to a means by which may be judged the testimony of a witness whose statements are alternately true and untrue.

It is evident to us that the trial court thought it proper to enter the judgment pursuant to pre-trial conference on the theory that the facts supporting the declaration were not disputed and that conflicting testimony on the pleas would not preclude such a course inasmuch as the pleas being improper, the evidence relevant to them could be ignored. As we have reached a contrary view about the pertinence of the defenses, it seems fitting for the cause to be reversed [fols. 772-776] that the issues raised by the pleas as they now stand; or are eventually settled, may be tried.

The judgment is, therefore, reversed with directions for further proceedings conformable to this opinion.

Reversed.

Brown, Chapman, Adams and Sebring, J. J. concur.

Buford, C. J., and Terrell, J. J. dissent.

## Dissenting Opinion

Buford, C. J. dissenting:

I dissent because I think the sales contract which constituted a part of plea was free of discrimination and therefore the pleas were of no avail.

[fol. 777] IN THE SUPREME COURT OF FLORIDA

[Title omitted]

APPELLEE'S PETITION FOR REHEARING—Filed November 17, 1944

To the Honorable Justices of Said Court:

Comes now the appellee, American Can Company, by its undersigned attorneys; and within the time allowed by the Court after the filing of the opinion and judgment of this Honorable Court in the above cause, makes and files this, its petition for rehearing, and respectfully requests the Court to permit appellee to file written brief in support of this application and also to permit oral argument hereon at such time as may suit the convenience of the Court.

Appellee respectfully shows unto the Court that the decision in this case is one of first impression, involving as it does the construction and application of the Act of Congress adopted June 19th, 1936, known as the Robinson-Patman Act, and said decision is not only of national import for that reason but also because the same involves the credit structure of all industries engaged in interstate commerce. Said decision is of paramount importance to appellee as well as appellant.

[fol. 778] The appellee further shows unto the Court that in arriving at the majority opinion filed in this cause the Court omitted or overlooked the following several matters and things as a result of which the original opinion and decision is deemed to be erroneous by appellee:

1. The practical effect of the majority opinion is tantamount to an amendment to the Robinson-Patman Act whereby Florida debtors are given a defense to an action for the purchase price of merchandise sold and delivered when Congress did not see fit to give such defense at the time it drafted and adopted said Act and has not since seen fit to add the same by amendment in due course.

2. The majority opinion overlooks the rule that where a statute creates a new offense and pronounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes, as well as the reason for that rule, which is as follows:

"The reason of the rule is that the statute, by providing a particular remedy, manifests an intention *to prohibit* other remedies, and the rule, therefore, rests upon a presumed statutory *prohibition*. It applies and it is enforced when anyone, to whom the statute is a rule of conduct, seeks redress for a civil wrong. He is confined to the remedy pointed out in the statute, for he is *forbidden* to make use of any other." (Italics ours)

*Dollar Sav. Bank* vs. *United States*, 86 U. S. 227.

3. The majority opinion overlooked the distinction between the case of *Continental Wall Paper Company* v. *Louis Voight & Sons Company*, 212 U. S. 227, and the case at bar. In the case cited it was held that the plaintiff and the defendant had entered into written agreements which were in flagrant violation of the Sherman Anti-Trust Law, and that the contracts of sale which were sued upon were based upon those illegal agreements, and were themselves illegal and [fol. 779] void. The opinion distinguishes the case of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 545, and says, at page 261:

"The case now before us is an entirely different one. The Continental Wall Paper Company seeks, in legal effect, the aid of the court to enforce a contract for the sale and purchase of goods which, *it is admitted by the demurrer, was in fact and was intended by the parties to be based upon agreements that were and are essential parts of an illegal scheme.*" (Italics in original.)

and a little later on the same page:

"The present suit is not based upon an implied contract of the defendant company to pay a reasonable price for goods that it purchased, but upon agreements, to which both the plaintiff and the defendant were parties, and *pursuant to which* the accounts sued on were made out, and which had for their object, and which is admitted had directly the effect, to accomplish the illegal ends for which the Continental Wall Paper Company was organized." (Italics in original.)

In the case cited it is obvious that both parties were *in pari delicto*, and neither could maintain any action against the other based upon the illegal agreement between them.

It was a "contract, conspiracy or combination" between the parties which was forbidden by the express terms of the Sherman Law. Nothing of the sort appears in the case at bar. On the contrary, Bruce's Juices, Inc., claims to be an innocent party and has commenced an action against the plaintiff in the Federal Court for treble damages to its business, caused, as alleged, by plaintiff's discrimination against Bruce's Juices, Inc., in sales to other customers of the plaintiff. This alleged discrimination is a collateral matter. It is not, and is not claimed to be, part of, or based upon, any illegal contract, conspiracy or combination between the parties to the action. If it were, it would, of course, follow that Bruce's Juices, Inc., could not maintain any action for damages based upon it.

[fol. 780] The notes sued upon in the case at bar were given for the purchase price of goods sold and delivered in the ordinary course of business. There is nothing in the Robinson-Patman Law which forbids or makes illegal any sale or contract of sale whatever; what the Act forbids is "discrimination" between customers, and discrimination is not a contract at all, but is a general course of business affecting the relation between the seller and all its customers. No doubt if the seller should sell goods to one of its customers as part of a contract, conspiracy or combination between seller and buyer to violate the Robinson-Patman Act, such a sale would be illegal and the plaintiff could not recover the purchase price, but neither could the buyer have any cause of action against the seller based upon the illegal contract, conspiracy or combination between them. The opinion in *Continental Wall Paper Company* v. *Voight & Sons Company*, at pages 256 to 262, distinguishes carefully and at length between the decision in that case and the decision in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 545. In the last cited case the buyer had refused to pay for goods sold and delivered to it upon the ground that the plaintiff was violating the Sherman Anti-Trust Law. It was held that this did not constitute a defense, because the contract of sale between the parties was not forbidden by law and was not made in pursuance of any illegal agreement between the parties, and the fact that plaintiff may have violated the anti-trust laws in its dealings with other customers or competitors was no defense to the action for the price of goods sold and delivered. The *Connolly* case, we

submit, is directly applicable to the case at bar and controls it.

The record does not indicate that Bruce's Juices, Inc., ever undertook to repudiate its contract with American Can Company as illegal, but on the contrary it appears that Bruce's Juices, Inc., stood upon that contract and required delivery of cans under it throughout the entire period in litigation, and paid interest for more than four years on the notes given for the purchase price. It is not suggested that American Can Company at any time would have had the right to repudiate its contract with Bruce's Juices, Inc., [fol. 781] as being illegal and void. The real gist of the defense in the present action is, not that the contract of sale is void, but that the forfeiture of the purchase price of goods sold under it is an additional penalty that should be imposed upon the seller for alleged violation of the Robinson-Patman Law in its dealings with other customers. No such penalty is imposed by the Act, and we submit that no such penalty can be read into it.

The consequence of the novel principle laid down in the case at bar that a buyer of goods may refuse to pay the price for the reason that, as alleged, the plaintiff is engaged in practices forbidden by the anti-trust laws, but to which the buyer is not a party, may be shown as follows. Suppose that Bruce's Juices, Inc., in its action for treble damages in the Federal Court, proves upon the trial that it has been damaged in the amount of $10,000 by American Can Company's illegal discrimination in favor of other customers. Bruce's Juices, Inc., would then be entitled to recover judgment in the Federal Court action for treble damages or $30,000, and in addition a reasonable counsel fee, let us suppose $10,000, making a judgment in the Federal Court action against American Can Company of $40,000. Then when the case at bar came to trial, by setting up the same facts, Bruce's Juices, Inc., could escape the payment of $114,000 upon notes given for goods sold and delivered to it and which it had used in its business, thus making a total recovery by Bruce's Juices, Inc., of $154,000 on account of $10,000 damage. This does not appeal to the sense of justice. We insist that there is nothing in the Robinson-Patman Law from which any such result can be deduced, even by the most strained reasoning.

4. The opinion in the cited case of *Continental Wall Paper Company* v. *Louis Voight & Sons Company*, at pages

260 and 261, distinguished the case of *Connolly v. Union Sewer Pipe Company*, 184 U. S. 540, 545, in the following language:

> "The present case is plainly distinguishable from the Connolly case. In that case the defendant, who sought to avoid payment for the goods purchased by [fol. 782] him under contract, had no connection with the general business or operations of the alleged illegal corporation that sold the goods. He had nothing whatever to do with the formation of that corporation, and could not participate in the profits of its business. His contract was to take certain goods at an agreed price, nothing more, and was not in itself illegal, *nor part of nor in execution of any general plan or scheme that the law condemned*. The contract of purchase was wholly collateral to and independent of the agreement under which the combination had been previously formed by others in Ohio. It was the case simply of a corporation that dealt with an entire stranger to its management and operations and sold goods that it owned to one who wished to buy them. In short, the defense in the Connolly case was that the plaintiff corporation, although owning the pipe in question and having authority to sell and pass title to the property, was precluded by reason *alone* of its illegal character from having a judgment against the purchaser. We held that that defense could not be sustained, either upon the principles of the common law or under the anti-trust act of Congress."
>
> "The case now before us is an entirely different one. The Continental Wall Paper Company seeks, in legal effect, the aid of the court to enforce a contract for the sale and purchase of goods which, *it is admitted by the demurrer was in fact and was intended by the parties to be based upon agreements that were and are essential parts of an illegal scheme*. We state the matter in this way, because the plaintiff by its demurrer admits for the purposes of this case the truth of all the facts alleged in the third defense. It is admitted by the demurrer to that defense that the account sued on has been made up *in execution of the agreements* that constituted or out of which came the illegal combination formed for the purpose and with effect of both restrain-

ing and monopolizing trade and commerce among the several States."

This language, we think, distinguishes the *Continental Wall Paper Company* case from the case at bar as clearly as it does from the *Connolly* case, and this distinction we think has been overlooked in this Court's decision.

[fol. 783] 5. The Court overlooked the fact that the rule applied in the cases of *Bement & Sons* v. *National Harrow Co.*, 186 U. S. 70, and *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, that anyone sued upon a contract may set up a defense that the contract is a violation of the Sherman Act, applies only when the contract sued upon is itself illegal and void, so that the parties thereto are *in pari delicto* and neither one of them can maintain any action against the other based upon the illegal agreement; while the Federal Courts have consistently refused to permit such defense in cases where only one of the litigants is guilty and the illegality pleaded is indirect, collateral to or remote from the cause of action, as it is here, so that the opposing party is innocent and has all the remedies given by the statute, which remedies are universally held to be exclusive.

6. This Court, in applying the rule "that anyone sued upon a contract may set up as a defense that it is a violation of the Act of Congress, and if found to be so, that fact will constitute a good defense," as stated in the opinion in the *Bement* case—186 U. S. 70, 22 S. Ct. 747, 46 L. Ed. 1058—, overlooked the following important distinctions between the cause of action and the defense made in the *Bement* case and in the case at bar:

(a) The *cause of action* in the *Bement* case was contracts *made by plaintiff and defendant* in violation of the Sherman Act, and the suit was for damages arising from *breach thereof*. Not only were the plaintiff and defendant *in pari delicto* but plaintiff in that case *could not establish his cause of action* without relying upon an illegal contract; and, therefore, came within the rule stated in *Miller* vs. *Ammon*, 145 U. S. 421, 36 L. Ed. 759, that:

"The general rule of law is that a contract made in violation of a statute is void; and that *when a plaintiff*

*cannot establish his cause of action without relying upon an illegal contract*, he cannot recover."

In the case at bar the cause of action was defendant's promissory notes, given for the purchase price of goods [fol. 784] sold and delivered in the ordinary course of business, not a contract made by the parties in violation of a statute. Consequently, plaintiff could and did establish its cause of action without relying upon an illegal contract. It did so by proof of the notes, the execution and amounts of which defendant expressly admitted.

(b) The *defense* in the *Bement* case was that *the contracts sued upon* "were in violation of" the Sherman Act, (p. 76) and the Court said: "—that anyone *sued upon a contract may set up as a defense that it*"—(i. e., the contract sued upon)—"is a violation of the Act *of Congress*, and if found to be so, that fact will constitute a good defense."

But no such defense is pleaded in the case at bar. Defendant's pleas do not allege that the cause of action, i.e., *the notes sued upon* are in violation of any statute or that the contract between plaintiff and defendant pursuant to which the notes were given, is in violation of any statute. The defense pleaded is that the notes sued upon were given by the defendant "as part of a transaction involving the sale of cans by the plaintiff to the defendant, and that said notes evidenced the purchase price of said cans; that the transaction * * * was unlawful *in that plaintiff * * * discriminated between different purchasers* * * * in violation of" law and "*therefore*, the consideration for said notes is illegal and said notes void and of no force and effect." In other words, the defense here, simply stated, is that the notes are void because collateral transactions between plaintiff and other purchasers discriminated against defendant. Plaintiff and defendant here are not *in pari delicto*. (See the pleas, Tr., p. 5.)

In the *Bement* case *the illegality pleaded* was not collateral to the cause of action sued on but was inherent in the contract or cause of action itself, consequently the Court said that the defendant might set up the defense that the contract itself is a violation of the Sherman Act; but the *illegality pleaded* in the present case does not inhere in the [fol. 785] promissory notes and is collateral to the cause of

action. Consequently, the applicable rule is that stated by Mr. Justice Brandeis in the *Loughran* case.

> "Here the relation of the illegality to the relief sought is indirect and remote. The wrong done is a thing of the past and collateral. By the long line of cases following *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. Ed. 679, 22 Sup. Ct. 431, it is settled that illegality constitutes no defense *when merely collateral to the cause of action sued on.*"

and by Mr. Justice Van Devanter in *Small* v. *Lamborn & Co.*, 267 U. S. 248, 69 L. Ed. 597, as follows:

> "it is *only* where the invalidity *is inherent in the contract* that the act may be interposed as a *defense*. With that exception the *remedies* which the Act provides for violation of it are exclusive."

which the Court overlooked and failed to apply.

7. In applying the rule stated in the *Bement* case, the Court overlooked or failed to give due consideration to the fact that in adopting the Robinson-Patman Act Congress provided remedies and penalties for its violation—(see Secs. 13, 13a, 21, 24, 25 and 26 of Title 15, U. S. C. A.)—and that the record in this case affirmatively shows that appellant, Bruce's Juices, Inc., is now pursuing one of those remedies, to-wit, action against American Can Co. for treble damages for alleged discriminations in violation of said act, in the United States District Court at Tampa—Tr., p. 645)—and also overlooked the rule that:

> "If the Congress expressly authorized one who purchased property from a combination organized in violation of its provisions to plead, in defense to a suit for the price, the illegal character of the combination that would present an entirely different question, but the Act contains no such provision."
>
> *Connolly* vs. *Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. Ed. 679.

[fol. 786] 8. In its consideration of the opinion of the Supreme Court of the United States in the *Sola Electric Co.* case and in its quotation from the opinion in that case, this Court omitted and overlooked the following important state-

ment contained therein? "And it"—i.e., the Supreme Court of the United States)—"has proceeded on the assumption that whether the *parties to an agreement* in violation of the Act are *in pari delicto* is a question of federal, not state law. *Harriman* vs. *Northern Securities Co.*, 197 U. S. 244, 49 L. Ed. 739, 25 S. Ct. 493; *Eastman Kodak Co.* vs. *Southern Photo Materials Co.*, 273 U. S. 359, 376-378, 71 L. Ed. 684, 690, 691, 47 S. Ct. 400." (Italics ours.)

9. In applying to this case the rule applied in *F. W. Stock & Sons, Inc.* vs. *Jacobson*, 18 N. Y. S. 2d 200; the Court overlooked the fact that it appears from the opinion in that case that the plaintiff and defendant were *in pari delicto;* that the cause of action was a contract made by the parties and that the defendant "urges that *the contract* is unlawful in that it is in violation of the Federal Statute commonly known as the Robinson-Patman Act," etc. The action was not for the purchase price of goods; but was brought upon a brokerage contract which was expressly forbidden by the terms of the Robinson-Patman Act.

10. In reaching the conclusion they did reach the majority opinion of the Court overlooks the fact that to permit such defense in a suit for the purchase price of merchandise sold and delivered would inevitably pervert the Robinson-Patman Act into an instrument for the perpetration of discrimination. To illustrate: A vendor and certain of his purchasers, desiring to create a monopoly, adopt the following scheme. The vendor sells his commodity to the favored customers on long term credit and to all other customers for cash but charges his credit customers a higher price for goods of like grade, quality and quantity. The credit customer pays an agreed part of his debt, and, ultimately, the vendor, as part of the illegal scheme, sues him for the balance. The defense is then collusively interposed [fol. 787] that the vendor has discriminated in price between different purchasers in that he charged his credit customer a higher price than his cash customers for goods of like grade, quality and quantity, and the proofs show that that was done. Thereupon judgment is entered for the defendant, who thereby escapes payment of the balance due by judicial determination that he has been discriminated against.

The net result of this collusive scheme is that the cash customer is, thereby, discriminated against for the simple

reason that the credit customer actually gets his goods for much less than the price paid by the cash customer. The obvious fallacy in the defense of discrimination is that the credit customer had not been discriminated against at all because he had never paid the higher price. The cash customer had been charged a less price but he had paid it.

Obviously there can be no actual discrimination in price between different customers of a commodity of like grade, quality and quantity until both customers have *paid* a different price. If both obtain goods and one pays and the other does not, he who pays is discriminated against, not he who gets his goods for nothing. This being so, Congress drafted the Robinson-Patman Act to provide a remedy by suit for any person injured in his business or property by reason of anything forbidden in the Act and for the recovery of *threefold* the damages sustained and the cost of suit, including a reasonable attorney's fee, but did not provide that the *defense* of discrimination should be available to a defendant sued for the purchase price of merchandise sold and delivered. If it were so, the defendant would cease to be discriminated against in the moment when his defense of discrimination was sustained. The remedies provided by the Act itself are exclusive.

11. In applying to this case the rule applied in *Embrey* vs. *Jemison*, 131 U. S. 336, 9 S. Ct. 776, 33 L. Ed. 172, the Court overlooked the fact that the cause of action in the *Embrey* case involved a gambling transaction in which the [fol. 788] plaintiff and defendant were equally guilty or *in pari delicto* in violation of a New York statute expressly providing that: "all wagers, bets or stakes, made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty or unknown or contingent event whatever, shall be unlawful. *All contracts* for or on account of any money or property, or thing in action, so wagered, bet, or staked, *shall be void;*" while the statute here involved only makes certain *discriminations*—not contracts—*unlawful*, not void.

12. In holding that:

> "From the authorities it appears that the courts will not lend their aid toward the enforcement of a *contract* which will further the violation of the law. If for that reason recovery will be denied the plaintiff where he

And the defendant may both be parties to the contract in contravention of the act, why would a defendant not a party, but a victim, be refused the same advantage? No reason occurs to us."

The majority opinion overlooks the reason that the statute which creates the offense gives to the victim remedies which are exclusive, and overlooks the decisions of the Supreme Court of the United States, cited and insisted upon by counsel for appellee, holding that:

(a) "And this is but a form of stating the elementary proposition that *courts may not refuse to enforce an otherwise legal contract because of some indirect benefit to a wrong-doer which would be afforded from doing so, or some remote aid to the accomplishment of a wrong which might possibly result—doctrines of such universal acceptance that no citation of authority is needed to demonstrate their existence, especially in view of the express* ruling in Connolly *vs.* Union Sewer Pipe Co., 184 U. S. 540, 46 L. Ed. 679, 22 Sup. Ct. Rep. [illegible], applying them to the identical general question here involved."

*D. R. Wilder Mfg. Co. vs. Corn Products Refining Co.*, 236 U. S., 165, 59 L. Ed. 520.

[fol. 788a] (b) "A general liability created by statute, without a remedy, may be enforced by an appropriate common law action; but where the provision for the liability *is coupled with* a provision for a special remedy, that remedy, and *that alone*, must be employed."

"As we shall have occasion to see, the American copyright act does give special remedies to the owner of a copyright of maps. Inadequate it may be to fully protect the property in the copyright, yet such as Congress has seen fit to give, and which it, not the courts, have power to enlarge by amendment of the statutes."

*Globe Newspaper Co. vs. Walker*, 210 U. S. 356, 28 S. Ct. 726, 52 L. Ed. 1096.

(c) "It is only where the invalidity is inherent in the contract that the act may be interposed as a de-

fense. With that exception the remedies which the Act provides for violations of it are exclusive."

*Small* vs. *Lamborn Co.*, 267 U. S. 248, 69 L. Ed. 597.

(d) "If the Act of Congress expressly authorized one who purchased property from a combination organized in violation of its provisions to plead, in defense to a suit for the price, the illegal character of the combination, that would present an entirely different question, but the Act contains no such provision."

*Connolly* vs. *Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. Ed. 679.

(e) "It is now settled law that the remedies provided by the antitrust Act for enforcing the rights created by it are exclusive."

*Geddes* vs. *Anaconda Copper Mining Co.*, 254 U. S. 590, 65 L. Ed. 425.

(f) "Where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes."

*Farmers & Mechanics Nat. Bank* vs. *Dearing*, 29 U. S. 29; 23 L. Ed. 196.

[fol. 788b] (g) "By the long line of cases following Connolly vs. Union Sewer Pipe Co., 184 U. S. 540, 46 L. Ed. 679, 22 Sup. Ct. 431, it is settled that illegality constitutes no defense when merely collateral to the cause of action sued on."

*Loughran* vs. *Loughran*, 292 U. S. 216, 78 L. Ed. 1219.

(h) "When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, *the answers to which are to be derived from the statute* and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield. Const. Art. 6, cl. 2; Awotin vs. Atlas Exch. Bank, 295 U. S. 209, 79 L. Ed. 1393, 55

S. Ct. 674; Dietrick *vs.* Greaney, 309 U. S. 190, 200, 201, 84 L. Ed. 694, 700, 701, 69 S. Ct. 480."

*Sola Elec. Co.* vs. *Jefferson Elec. Co.*, 317 U. S. 173, 63 S. Ct. 172, 87 L. Ed. 165.

(Foregoing italics supplied.)

13. Since Appellant affirmatively abandoned all other defenses, the only remaining defenses it contends here were discriminations which should have been submitted to a jury, summarized, are:

(a) The sale of a size 312 can at $9.68;

(b) The difference in price between the 312 and 314 cans;

(c) The quantity discount system of appellee;

Appellant does not claim any alleged price discrimination occurred on the 312 can, nor on the difference in price of the 312 and 314 cans, prior to September 28, 1939. The record shows that of the indebtedness covered by the notes, $7,000.00 thereof was due by appellant prior to May 26, 1939; that $94,800.00 of the balance was so due prior to August 18, 1939 (see Stipulation of counsel, Record 745-[fol. 788c] 746). Only the $12,000. note declared upon in the first count of the declaration covered purchases after September, 1939, and that covered purchases prior to October 1, 1941. The record is, therefore, barren of any evidence to connect 90% of the indebtedness with the grounds claimed in (a) and (b) above. As to the remaining 10% of the indebtedness, Appellee's evidence on ground (b) showing the comparison of the can prices and method of fixing same, (Record 695) stands undenied and uncontroverted by any evidence of probative value; and, on ground (a) appellant admitted it ceased using the 312 can months before the price complained of, $9.68 was quoted by appellee. There was, therefore, *no* evidence to connect either of the defenses of illegality, as set out in (a) and (b) above, with the cause of action sued upon and it would have been reversible error to submit any issue thereon to a jury.

The evidence on ground (c) above, shows appellant participated in and received a quantity discount in 1939, (Record 80-142-604-638) which it has neither returned nor offered to return. It admits the quantity discount was uniformly available to all customers who bought the mini-

nums provided, and that it knew of no instance where the discount was given to a customer who was not entitled thereto, as the system provided (Record 101; 638). Appellee's witnesses described the establishment of the quantity discount system, and how a careful and painstaking test of nearly five years established that savings were made on quantity sales equal to or greater than the discount allowed (Record 276, 279, 735). There was no evidence to deny or controvert this testimony or to prove that the quantity discount breached the Act pleaded. All Appellant offered was the observations of its president (Record 596-620). The trial Judge overruled the appellant's defense bottomed on this point in the following words (Record 743):

> "I am not going into the question of whether that is a proper way to do it or not because if that is the way he has been doing business as a rule, *I cannot see how it hurts Mr. Bruce, or anybody else is hurt by it.*"

[fol. 788d] There was nothing in the evidence to connect the indebtedness sued upon with any violation of the Act, relative to the quantity discount system.

Appellee respectfully submits that there *was* no fact issue proper for submission to a jury, and as all of the evidence is in, this evidentiary point *must* be considered and decided by this Court before the case can properly be remanded and the trial Judge and litigants be fully advised of the matters considered and determined by this Court.

14. This Court failed to consider the full scope and effect of the trial Court's ruling, and the quality of Appellant's evidence measured and weighed in the light of that ruling, and decide thereon, *as a matter of law*, whether a trial Court could submit that evidence to a jury for determination.

Here, *the trial Judge found and determined:*

That all the evidence of the parties had been submitted (Record 743)

> "No other defenses are offered, nor is it contended that the record in the cause discloses that any other defenses might be interposed" (Record 746), which ruling Appellant admits to be correct, (Appellant's Reply Brief, page 3)

> "That all questions of law and fact are settled in favor of the Plaintiff (Appellee)" (Record 746). The trial Judge had theretofore deferred ruling on admission of evidence until final hearing, (Record 585).

Under the rule approved by this Court, the judgment of the lower Court will be upheld if correct for any reason, irrespective of the reason assigned or followed by the lower Court. To follow this rule, the appellate Court must necessarily consider the entire record of this cause.

The pleas, (wherein Appellant charged Appellee with discriminating in price against it in favor of others, while averring simultaneously that such prices and terms of sale [fol. 788e] were unknown to it, Record 52); the defenses abandoned during the progress of the cause on appeal, (Record 95; Appellee's Brief, pages 5, 42); and the quality and nature of the evidence it offered, demonstrate to a moral certainty the frivolous and baseless nature of the defenses here, and the trial Court, in entering summary judgment, not only performed a duty imposed upon him by law, but obeyed the rule laid down by this Court in *Rhea* v. *Hackney*, 117 Fla. 62, 157 So. 190:

> "We hold, therefore, that where a Defendant interposes a plea that is good on its face but is false in fact, and it is indisputably so shown to the satisfaction of the Court, and it further inferentially appears that the plea was interposed principally for delay or other unworthy motive, with no reasonable expectation that it could ever be sustained at a trial of the issues raised by such plea, if a trial should be had on it, the Court may entertain and grant a motion by Plaintiff to strike out such plea as sham, and may as an incident thereto award final judgment for Plaintiff on his cause of action, being guided by like considerations in dealing with sham pleas to those prevailing when pleas are stricken as frivolous."

The law does not demand the doing of a vain and useless thing. Yet this is the result which will follow here unless the appellate Court considers and passes upon the entire record, for, if remanded for trial and the same evidence is submitted to a jury, (and the record shows there is no further evidence), the trial Court's order leaves no doubt

that he will direct a verdict for Appellee. The Supreme Court of the United States, in *Pleasants* v. *Fant*, 89 U. S. 116, 22 L. Ed. 78, laid down the rule:

> "Must the Court go through the idle ceremony in such a case of submitting to the jury the testimony on which the Plaintiff (Defendant here) relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of Plaintiff (Defendant here), that verdict would be set aside and a new trial had? Such a proposition is absurd, and, accordingly, we hold the true principle to be, that if the Court is satisfied that [fol. 788f] conceding all of the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the Plaintiff, (Defendant here), the Court should say so to the jury".

The trial Judge in this case was the trial Judge in *Hillsborough County* v. *Sutton*, 8 So. 2d 401. Here, he followed the rule of that case, and we emphasize that *in the Sutton case, the parties did not agree that there was no conflict on the facts,* but the trial Judge himself as a matter of law decided there was none. He did the same in the case at bar. See Record p. 746 where he said in his order at the conclusion of the pre-trial conference:

> "And the Court *having considered the evidence of the parties and the record* in said cause together with the admissions of counsel."

We submit that the rule of the *Sutton* case applies and controls here, and that the procedure of the trial Judge was eminently correct.

We are constrained to point out to the Court that the pre-trial conference rule was obviously designed to accomplish just the purpose demonstrated here, and, unless given effect accordingly, the rule should be changed or revoked so the bar will not misunderstand its scope.

Appellee respectfully submits that, unless the decision here is made upon the entire record and evidence, not only will the foregoing prevailing rules be discarded, but a severe burden will fall upon litigants and the trial Court. The size of the record here eloquently demonstrates the amount of time, expense, and effort required of counsel and the

parties in complying with the pre-trial conference order and presenting their evidence to the trial Judge. This evidence was taken on two occasions in New York City, and on several other occasions directly before the trial Judge Parks in Tampa. (The record shows that one hearing alone, called in New York by Appellant, cost Appellee $5,000.00. Record page 133). Obviously, no comment is needed that [fol. 788g] the repetition of these efforts, with attendant delays and added expense, and the added inconvenience entailed at this time because many employees in armed service have left the load of their duties upon remaining employees, will create a most expensive and onerous burden, and one which we urge is unnecessary.

15. The effect of the opinion of this Court, permitting Appellant to interpose its pleas of price discrimination (and permitting such defense holds that, if proven, a verdict for Appellant thereon necessarily must follow), is that if a jury decides for Appellant, the latter thereby gets for nothing the cans it received and consumed. This at once results in an absurdity, for thereupon any claim of discrimination in price must instantly vanish, since Appellant will have paid nothing for the cans it received, and hence no price paid by any other customer can possibly be discriminatory against Appellant. Thus, the issue on which Appellant succeeds ceases to exist simultaneously with the return of a favorable verdict thereon. This result inevitably nullifies the opinion of this Court permitting the defense of price discrimination to be interposed. Thus is patent the reason for the principle, that the remedy of Appellant for any contended grievance on price discrimination must of necessity be those *affirmative* remedies provided by the Robinson-Patman Act, *after Appellant has paid for the goods*, for, unless and until he pays for the goods, there can be no price discrimination between the price charged to, but not paid by Appellant, and the price made in another sale to another customer.

A sells two different sizes or grades of apples, viz., big apples and little apples. His price for big apples is six cents each and for little apples is five cents each.

B and C are different customers of A. B selects a big apple which A sells him for six cents *on credit*. C selects a little apple which A sells him for five cents *cash money*. B and C eat their apples. B then claims that the sale to

C discriminated in price against B. Consequently B refuses to pay anything for the apple he consumed.

[fol. 788h] If B never pays A and so gets an apple for nothing, is B discriminated against?

Answer: The difference in price is immaterial if B never pays that difference. B gets an apple for nothing, consequently he is not discriminated against in price. The discrimination is the other way.

## Summary

In conclusion, Appellee respectfully urges that the opinion in this case as written adopts a doctrine leading to startling and dangerous consequences. Trial Judge Parks was cognizant of the manner it would involve the trial courts, for he commented (Record 743):

> "This question is not one that ought to be before this Court, as I have had occasion to remark, but it ought to have been before the Federal Trade Commission on the question of whether or not this system that is set up here is legal under the Robinson-Patman Act. *It hasn't got any business in this Court because we have not the facilities to investigate all those things*, and we are not the Body authorized to investigate whether or not their system of doing business is legal under the Robinson-Patman Act. As I understand it, the question of whether or not this system of doing business is legal or not is vested in the Federal Trade Commission." (Italics ours)

The effect of the opinion here is that a seller of goods may not collect its debts, and any or all of its buyers can keep and use the goods without any obligation to pay for them, simply by claiming price discrimination, which is not merely a simple matter concerning only the prices charged to two customers. For, in each case, a monumental burden would devolve upon the trial Court, since in determining such issue of fact it would be necessary to analyze the entire price structure and operating costs of the seller; to examine carefully the reasons for all differences in price (For not all price differences are prohibited by the Act); to study the [fol. 788i] competitive situation in the respective industries in which both parties are engaged and to search out and determine the effect of such differences on competition.

And then, after all of this is done, to hold that if the result is that any difference in price is not justified under the Act, and the seller is without remedy to recover the purchase price of goods sold and delivered, would lead to preposterous complications, and encourage every impecunious and unscrupulous buyer to claim discrimination, good faith therein being immaterial; and at the same time, leave the seller liable to be pursued on the stringent affirmative remedies afforded by the Act. It is impossible to conceive of a doctrine which could more effectively destroy all credit business. Congress never intended the Robinson-Patman Act should be so applied, and no such intention can be read into it. And Congress knew that state trial courts are not implemented to conduct the extended and intricate investigations the Act entails, and hence designated the Federal Trade Commission as the body to handle those matters.

Therefore, Appellee respectfully requests that a rehearing and re-argument be allowed by this Court for the foregoing reasons.

Respectfully submitted, John M. Allison, Harry B. Terrell, and Whitaker, Whitaker & Terrell, All of Tampa, Florida, Attorneys for Appellee.

---

[fols. 789-790] IN THE SUPREME COURT OF FLORIDA

[Title omitted]

ORDER GRANTING PETITION FOR REHEARING—January 5, 1945

Counsel for Appellee having filed in this cause Petition for Rehearing and having been duly considered, it is ordered by the Court that said Petition be and the same is hereby granted and the cause set down for oral argument at 9:30 o'clock A. M. Friday, February 16th, 1945, before the Court En Banc.

[fol. 791] IN THE SUPREME COURT OF FLORIDA, JANUARY TERM, A. D. 1945

En Banc

BRUCE'S JUICES, INC., a Florida Corporation, Appellant,

vs.

AMERICAN CAN COMPANY, a New Jersey Corporation, Appellee

An Appeal from the Circuit Court for Hillsborough County, L. L. Parks, Judge.

Cody Fowler and Shackleford, Farrior & Shannon; for Appellant.

John M. Allison, Harry B. Terrell and Whitaker, Whitaker & Terrell, for Appellee.

OPINION—Filed April 17, 1945

Per CURIAM:

On rehearing granted after arguments and briefs submitted, we are of the opinion that the defense attempted to be interposed was not available under the facts submitted in evidence to the court below and, therefore, the judgment should be affirmed.

It is so ordered.

Terrell, Brown, Buford and Sebring, J. J. concur.

Chapman, C. J., Thomas and Adams, J. J. dissent.

CONCURRING OPINION

SEBRING, J., concurring:

Upon reconsideration of the matter I have come to the conclusion that the subject matter of the pleas is not legally available as a defense in the state courts in a common law suit on the promissory notes involved. I therefore concur in the conclusion that the judgment of the Court below should be affirmed.

[fols. 792-793] DISSENTING OPINION

Upon rehearing granted we adhere to the original opinion.

Chapman, C. J., Thomas and Adams, J. J. concur.

[fols. 794-795] IN THE SUPREME COURT OF FLORIDA

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—June 29, 1945

Counsel for Appellant having filed in this cause Petition for Rehearing and having been duly considered, it is ordered by the Court that said Petition be and the same is hereby denied.

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[fols. 796-797] IN THE SUPREME COURT OF FLORIDA

[Title omitted]

ORDER STAYING MANDATE—June 30, 1945

Upon consideration of the motion of counsel for Bruce's Juices, Inc., for an order staying the mandate herein pending an application to the Supreme Court of the United States for a writ of certiorari, it is hereby

Ordered, that the mandate of this Court be, and the same hereby is, stayed pending appellant's petition in the Supreme Court of the United States for a writ of certiorari, provided said petition for certiorari is presented in said Supreme Court within the time required by law.

R. H. Chapman, Chief Justice of the Supreme Court of the State of Florida.

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[fols. 798-799] IN THE SUPREME COURT OF FLORIDA

[Title omitted]

CERTIFICATE

I, R. H. Chapman, Chief Justice of the Supreme Court of Florida, do hereby certify:

That the Supreme Court of Florida, of which I am presently Chief Justice, is the highest Court of the State of Florida, in which a decision in this cause could be had.

It is hereby Ordered that this certificate be, and the same is hereby, made part of the record in the above cause.

Dated at Tallahassee, Florida, this 2nd day of July, A. D. 1945.

(S.) R. H. Chapman, Chief Justice of the Supreme Court of the State of Florida.

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[fol. 800] In the Supreme Court of Florida

[Title omitted]

Directions to Clerk—Filed July 5, 1945

To the Honorable Guyte P. McCord, Clerk of the Supreme Court of the State of Florida:

You are hereby requested to make a transcript of record to be filed in the Supreme Court of the United States in which Court appellant is filing Petition for Certiorari and include in said transcript in the order given below the following:

1. The transcript of record from the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, filed herein.

2. Opinion of the Supreme Court of Florida filed October 20, 1944.

3. Order granting appellee's petition for rehearing dated January 5, 1945.

4. Opinion filed April 17, 1945.

5. Order of Court denying appellant's petition for rehearing filed June 29, 1945.

6. Order entered by Honorable R. H. Chapman, Chief Justice, staying the mandate.

[fols. 801-802] 7. Certificate of Honorable R. H. Chapman, Chief Justice filed July 2, 1945.

Dated this 3rd day of July, A. D. 1945.

(S.) Cody Fowler, R. W. Shackleford, Attorneys for Appellant.

Fowler & White, Shackleford, Farrior & Shannon, of Counsel.

We, the undersigned attorneys for the appellee in the foregoing cause, hereby acknowledge receipt of copy of

Directions to the Clerk to prepare and certify record in accordance with copy hereto dated July 3rd, 1945.

(S.) John M. Allison, Harry B. Terrell, by John M. Allison, Attorneys for Appellee.

---

[fol. 803] IN THE SUPREME COURT OF FLORIDA.

[Title omitted]

APPELLEE'S ADDITIONAL DIRECTIONS TO CLERK—Filed July 10, 1945

To the Honorable Guyte P. McCord, Clerk of the Supreme Court of the State of Florida:

The American Can Company, Appellee in the above-styled cause, for additional directions to the Clerk in making up transcript of record to be filed in the Supreme Court of the United States, in which Court Appellant has given notice it is filing its Petition for Certiorari, designates the following additional portions of the proceedings in the above-styled Court, to be included in said transcript immediately following the opinion of the Supreme Court of Florida, filed October 20, 1944, to-wit:

1. Appellee American Can Company's Petition for Rehearing filed in the above cause on November 17, 1944.

Dated this July 9, A. D. 1945.

John M. Allison, Harry B. Terrell, Whitaker, Whitaker and Terrell, by John M. Allison, Attorneys for Appellee.

[fol. 804] We, the undersigned attorneys for the Appellant in the foregoing cause hereby acknowledge receipt of copy of Appellee's Additional Directions to the Clerk designating proceedings to be included in the transcript in above cause, in accordance with copy hereto, dated July 9, 1945.

Cody Fowler, R. W. Shackleford, by (S.) Cody Fowler.

[fol. 805] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 806] SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION FOR CERTIORARI

Upon Consideration of the application of counsel for the petitioner,

It Is Ordered that the time for filing a petition for certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 15, 1945.

Wiley Rutledge, Associate Justice of the Supreme Court of the United States.

Dated this 29th day of June, 1945.

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[fol. 807] SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION FOR CERTIORARI

Upon Consideration of the application of counsel for the petitioner,

It Is Ordered that the time for filing a petition for certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 5th, 1945.

Hugo L. Black, Associate Justice of the Supreme Court of the United States.

Dated this 16th day of July, 1945.

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[fol. 808] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 13, 1945.

The petition herein for a writ of certiorari to the Supreme Court of the State of Florida is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

FILE COPY

Office - Supreme Court, U. S.
FILED
SEP 5 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945.

No. [redacted] 27

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BRUCE'S JUICES, INC., a Corporation, *Petitioner*,

v.

AMERICAN CAN COMPANY, a Corporation.

---

## PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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CODY FOWLER,
FOWLER & WHITE,
Tampa, Florida,

R. W. SHACKLEFORD,
SHACKLEFORD, FARRIOR & SHANNON,
Tampa, Florida,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

# Supreme Court of the United States

OCTOBER TERM 1945.

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No. ——

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BRUCE'S JUICES, INC., a Corporation, *Petitioner,*

v.

AMERICAN CAN COMPANY, a Corporation.

---

## PETITION FOR WRIT OF CERTIORARI.

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*To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.*

Your petitioner, Bruce's Juices, Inc., respectfully prays for a writ of certiorari to the Supreme Court of the State of Florida to review the decision and judgment of the said Court in the above entitled case dated April 17, 1945.

### I.

### SUMMARY STATEMENT OF THE MATTER INVOLVED.

Bruce's Juices, Inc., is an independent processor of fruit juices operating a plant in Tampa, Florida. It sells

its products in a number of states which can be economically supplied from that base. It buys containers which it uses from American Can Company. Its annual purchases from that company amount to about $350,000.00. (R. 110).

The American Can Company is the world's largest manufacturer of cans. Under a central management it operates plants and warehouses in twenty-five states (including a plant at Tampa) in order most effectively to meet competition in each area. (R. 220). Its costs in these several plants, dependent as they must be upon varying circumstances of production, are different. American Can Company supplies the containers used by the larger competitors of your petitioner which sell not only in petitioner's market, but on a nation wide scale. Among them are California Packing Corporation (Del Monte brand); Stokely Brothers and Company (The Van Camp brand); Hawaiian Pineapple Company; Libby, McNeil & Libby; and the Great Atlantic and Pacific Tea Company. (R. 111-112). These large competitors, purchasing from the same company as your petitioner, are supplied, not from a single plant, but from plants located all over the country. Their aggregate annual purchases, scattered among many plants, amount to many millions of dollars each. California Packing Corporation alone buys more than $7,000,000 in cans each year from American Can Company. (R. 201).

The contracts under which American Can Company supplies cans both to your petitioner and to its larger competitors are practically identical. (R. 106-108). The quoted price is subject to a sliding scale of discounts based upon total annual purchases, irrespective of whether the orders are filled from one or many plants. These discounts run from 5% if the annual purchase is over $7,000,000.00 down to 1% on a $500,000.00 annual purchase. No discounts are allowed for quantities under $500,000.00. (R. 129). The practice of basing discounts upon such aggregate purchases instead of upon orders filled from a single plant does not

correctly reveal differences in costs. Its effect, however, is seriously to handicap an independent company selling in competition with a corporation which operates a number of widely scattered plants. Thus your petitioner buys from the plant of American Can Company in Tampa, Florida, a quantity fully equal to amounts delivered from the same plant to the local establishments of Stokely Brothers and to the California Packing Corporation. (R. 75). Yet your petitioner receives no discount on its purchase, while California Packing Corporation receives a 5% discount on orders of the same size. In only one year was it, by reaching a volume of $500,000.00, able to obtain a discount—1%. It is clear that under this system the product of a canner whose purchases from a local plant are equal to, or even greater than those of his larger competitor, cannot compete with a nation wide brand on equal terms.

Canning is a business of great volume and small profit. The cost of cans often runs as high as 50% of the factory cost of the product. Thus the system of discounts established in the contracts involved in this case tends to impair, or even to destroy, independent local competition in every area. It is a direct invitation, indeed a compulsion, toward the merger of independent local canners into one or more combinations or their absorption by corporations which sell on a nation wide scale. For example, if the California Packing Corporation should acquire Bruce's Juices, the petitioner, through the very fact of operating as a part of a larger corporate imperium, would immediately be entitled to the 5% discount which is now beyond its reach.

The case at bar arose out of the competitive hardship imposed by the system of discounts outlined above. Ever since the passage of the Robinson-Patman Act your petitioner has had a continuing account with American Can Company under which from 1937 to 1942 only it has paid more than $2,000,000.00 for cans. (R. 110). Prior to the institution of this suit it owed a balance on this account of about $114,000.00 which was substantially repre-

sented by promissory notes. Your petitioner had repeatedly protested against the system of price discrimination and against other special favors to its larger competitors. As antecedent to a settlement of its account, it asked for an adjustment on the basis of the equality of treatment demanded by federal law; but no relief was given. Instead American Can Company brought the present suits on the promissory notes. It thus sought to enlist the aid of the Florida Courts in policing its system of discriminatory prices and competitive handicaps.

The sole defense to this action finally relied on by petitioner was that the renewal notes sued on were illegal and unenforceable because the transaction in which they were executed was unlawful as in violation of the Robinson-Patman Act. In respect to the defense interposed, no issue of fact was ever tried.

Proceedings in the lower court were limited to a pre-trial conference instituted by the court on its own motion. (R. 57). Its sole purpose was to ascertain whether amendments should be made to the pleadings and to narrow and clarify the issues in controversy. To this end testimony was heard and depositions were taken. It was not, and it was never intended to be, a trial of issues of fact. The record here, voluminous as it is, is to be considered in the light of the function it was intended to serve. The taking of testimony, both upon the discriminations of American Can Company, including its price policies, and upon its alleged justification, was never completed. In respect to these issues the plaintiff refused to answer questions, and its refusals were never ruled on by the court. The trial judge gave no official consideration to this incomplete body of evidence; he made no findings of fact. Before the pre-trial conference was completed he came to the conclusion that, as a matter of law, the defense that the contract violated the Robinson-Patman Act was not available in a suit in a state court. He held, in the light of that ruling, that there was no purpose in completing the testimony, (R. 581), and entered judg-

ment against petitioner in the sum of $122,789.60. (R. 584-585).

On appeal, and in a carefully considered opinion, the Supreme Court of Florida, two of the seven judges dissenting, reversed the ruling of the trial court. It held that the defense of a violation of the Robinson-Patman Act was available to your petitioner. It, therefore, remanded the case for trial of the issues raised by that defense. (R. 593-601).

After a rehearing the Supreme Court of Florida, by a vote of four to three, affirmed the judgment of the court below, ignoring its former ruling. One judge insisted that as a matter of law the defense requested was not available. Three judges out of seven, in a so-called per curiam opinion, without citation of authority or recitation of reasons, held that "the defense attempted to be interposed was not available under the facts submitted in evidence to the court below." The three remaining judges adopted as their dissenting opinion the original opinion rendered by the court. (R. 621). Thus four judges, differing in their interpretation of the law, voted to affirm the judgment of the court below, thus leaving to the defendant no remedy save a petition to this Honorable Court.

## II.

## BASIS OF JURISDICTION.

The jurisdiction of this Court is invoked under Sec. 344(b), 28 U. S. C., (Jud. Code, Sec. 237), the petitioner having been denied a right, privilege, or immunity specifically set up and claimed under a federal statute, to wit: Section 13 and 13a of the Robinson-Patman Act, Title 15, U. S. C. A.

## III.

## QUESTIONS.

1. *In an action in a state court to collect promissory notes given as consideration for purchases in interstate commerce at prices which through their discriminatory character tend substantially to lessen competition, may the defendant plead that such notes are unenforceable because the transactions on which they are based violate the Robinson-Patman Act?*

This question does not require the Court to decide that the entire transaction is so tainted with illegality that the seller cannot collect even the fair value of the goods, thus giving the buyer a windfall. The question can, of course, be answered on that broad ground; and the petitioner intends to argue that a transaction unlawful under the Robinson-Patman Act constitutes criminal conduct which a court can not be called upon to police and upon which no money judgment can be based.

But, if it be admitted that the buyer is entitled to the fair value of the goods, petitioner's defense can be sustained on a narrower ground. It is that narrow ground which is actually presented by the record. There is here, on the part of the plaintiff, no mere demand for the fair value of its merchandise. Instead the record of the unfinished pre-trial conference suggests the strong probability that petitioner has already paid the fair value based on prices at which American Can Company sells to its larger competitors. This is, in fact, not a suit for debt lawfully due. It is rather an action to enforce a system of prices and trade practices which, through its departures from equality of treatment, has prevented and still prevents petitioner from competing on equal terms with its more favored competitors. If, in separate actions brought against individual purchasers, state courts can enforce the collection of discriminatory prices, they can defeat the entire purpose of the Robinson-Patman Act. By denying such a defense as is sought here,

they can make secure a widespread system of mercantile discrimination. Thus, by their very judgments, state courts can put a sanction on transactions forbidden by federal law.

By obtaining a judgment in this case the American Can Company has secured the aid of a state court in effectuating the objective which the Act specifically condemns. Thus the state court has become an active instrument in injuring, lessening and preventing the market competition which it is the very intent of the antitrust acts to keep alive.

*2. Are the pleas—as clarified and supported by the unfinished pre-trial conference—sufficient to require the lower court to submit the issues of price discrimination to trial on their merits?*

The record represents the proceedings of an unfinished pre-trial conference. It is put forward to show that the plea of violation of the Robinson-Patman Act which petitioner sought to interpose in the action brought against it is substantial and not frivolous. It is introduced for the sole purpose of demonstrating that the defense sought raises a series of important federal questions upon which petitioner is entitled to a trial at law.

The larger question breaks into two separate questions:

(1) Were the allegations by petitioner of discriminatory practices in violation of the Robinson-Patman Act sufficient to require their submission to trial by law?

These allegations, supplemented by the pre-trial conference, disclosed the following illegal practices:

(a) Contracts between the American Can Company and the competing customers to whom it sells at prices highly discriminatory on their face in violation of the Robinson-Patman Act.

(b) Departures from the quoted prices, e. g., sale of cans in Texas at prices lower than those made to petitioner, in violation of that statute.

(c) Favors and special services, such as equipment for closing cans and "freight equalization", withheld from peti-

tioner without extra payment and rendered without cost to its larger competitors, in violation of that Act.

(d) Quantity discounts, granted on the aggregate volume of annual sales, irrespective of whether orders are filled from one plant or many, unjustified by the exception set down in that statute.

(2) Did petitioner, at the pre-trial conference, make such admissions as to forfeit its right to have the issues submitted to a trial at law?

*3. Is a right established by federal law to be abridged or denied by serious departures from the ordinary requirements of proper process in a state court?*

Petitioner grants that, within the most tolerant limits, the highest court of a state is free to shape its own judicial procedure and to review the judgments of its lower courts in its own way. Nor does it question the right of the Florida Supreme Court, in a cause which involves only state law, to employ a summary judgment for which the state statutes make no provision. It does, however, insist that under our system of government, the right of the litigant to a defense grounded in federal law is not to be denied or abridged by a procedure which departs as radically from the minimum requirements of proper process as that recited in the pages which follow.

## IV.

## REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

*1. It is of national importance that, to the question of the right to plead a violation of the Robinson-Patman Act in a suit in a state court, an authoritative answer be given.*

The answer to this question is of importance in its effects upon litigation, the conduct of business, the pattern of the economy, the general welfare. It appears, as is set forth

below,[1] that the Robinson-Patman Act is a spelling out in some detail of the prohibition against restraint of trade. It seems to follow that a defense, which according to the decisions of this Court, is available when the offense is against the common law or the Sherman Act is also available when the offense is against the Robinson-Patman Act. If it is, the final decision of the Florida Supreme Court is not in accord with the law,[2] and justice to petitioner demands that it be corrected. If it is not, the distinction between the Robinson-Patman Act and the other parts of the antitrust code should be clearly and authoritatively set forth. The issue presented here may emerge in a case in any state in the Union; and the administration of justice demands that state courts the country over should be able to rule correctly upon the availability of the defense sought here.

The importance of this question transcends the interest of petitioner. If the victim of a flagrant violation of the Robinson-Patman Act, denied the opportunity to enter such a defense when sued, must in another action go into the federal courts for help, the practical effect is to defeat to a large degree the purpose of the Robinson-Patman Act. The economic consequences of this result are serious. For then the only remedy which lies within the means, as well as the legal reach, of the small concern—that of a defense in his local court—is lost. There is taken away the defense of a plea of restraint which since time immemorial has been among the ancient rights of the litigant. The results are of general concern; they should not—they cannot—be measured in terms of injustice done in the individual case.

To approve—and thus to convert into the law of the land—the judgment of the Florida Supreme Court is to enthrone a nationwide system of discriminatory trade practices. The mantle of protection which the Congress zealously has thrown about the small manufacturer and the

[1] See pp. 18-21 below.

[2] See citation in Footnote 4.

small merchant will have been torn away by the judiciary.

It is for this Court categorically to say whether the purpose of the Congress in outlawing discriminatory practices is to be compromised or even thwarted by a judicial denial of age-old pleas which are instruments of its realization. For the right to plead restraint of trade as a defense is the one weapon with which the small business concern may protect itself.

*2. The Florida Supreme Court has decided a federal question of substantial importance contrary to the decisions of this Court.*

The record makes it clear that the outcome of this litigation turned upon the answer given to a federal question in the courts of Florida. The Circuit Court of Hillsborough County, Florida, held that the defense of violation of the Robinson-Patman Act was not available in an action in a state court. By such a ruling it cleared the way for a judgment in favor of the plaintiff in respect to the three promissory notes. On appeal the Supreme Court of Florida, reversing the lower court, held that such a defense was available and that the defendant was entitled to an opportunity to make out his case. Although they arrived at opposite results, the two opinions were alike bottomed upon the decisions of this Court. And whatever be the rationale of the Supreme Court of Florida in its second judgment—whether it held as a matter of law that the defense asked for was not allowable or whether it held that on the evidence taken at the pre-trial conference the trade practices in question did not violate the law—it concerned itself with a federal right, entertained a federal question, and entered a judgment in a realm where the decisions of this Court are authority.

Yet it requires little argument that the defense put forward by petitioner would have been available in a cause of

action in a federal forum. The right to such a plea is definitely settled by the decisions of this Court.[3]

3. *The sound administration of justice demands of a state court, when called upon to interpret and apply a federal statute, a construction at harmony with that given to it in the federal courts.*

Here a situation is presented which is the converse of that resolved in *Erie Railroad v. Tomkins*, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188 (1938). That case decided that, when called upon to interpret and apply state law, the federal court should follow the decisions of the highest court of the state in question. In the trial of the present cause, the petitioner put forward as a defense a privilege and an immunity conferred upon it by a federal statute. The rationale of the *Erie* case would seem to demand a disposition of the proposed plea by the Supreme Court of Florida in harmony with that which would be accorded it in the federal courts.

In the situation presented here the need for uniformity stands out the more sharply. The criticism of the *Erie* decision has been that, if the federal court follows the courts of the several states, it will be at the expense of a chance at uniformity the country over. Here it is a nationwide uniformity in the interpretation of a federal law which the rationale of the *Erie* case will serve. Thus the logic of that holding unites with criticism of it to demand that the state court follow the federal decisions. The rule of harmony sought here can come only from the United States Supreme Court.

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[3] *Belcnap & Sons* v. *Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058; *Continental Wallpaper Co.* v. *Louis Voight & Sons Co.*, 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486; *Prati* v. *Davis Coke, Light and Coal Co.*, 168 U. S. 255, 18 Sup. Ct. 62, 42 L. Ed. 458; *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 63 Sup. Ct. 172, 87 L. Ed. 165.

*4. The holding of the Florida Supreme Court, if allowed to stand, would impair the enforcement of the Robinson-Patman Act; seriously weaken the competitive position of small business; and promote a concentration of economic wealth and power in contravention of public policy as manifest in the antitrust laws.*

A denial of the defense asked for involves the most serious consequences.

(1) The loss of a remedy, perhaps the most effective remedy, will rob the Robinson-Patman Act of much of its power of prevention. The victims of price discrimination will be denied the opportunity to defend themselves when in ordinary suits at law the transactions out of which such unlawful conduct emerges are already in court and the defense is most easy and certain. The vigilance of the wronged in the defense of their own right, upon which, among other sanctions, the enforcement of the antitrust laws has been rested, will be lost. And, since administrative action is uncertain and the triple damage suit too expensive for everyday use, the risks which attend violation will be materially reduced.

(2) As a consequence all small business will be put in jeopardy. The seller, who maintains a multiple price structure, will institute his suits in state courts, where the buyer can not fight back by pleading the discriminatory practices to which he has been subjected. The victim, however great the handicap imposed on him, can assert his rights only by instituting a new suit for triple damages in a federal court or by waiting for the federal government to come to his rescue. The triple damage suit is likely to prove protracted and expensive; damages caused by a disadvantageous competitive position are so speculative as to be usually unprovable. Nor can the buyer rely for protection upon the action of the government. The Department of Justice or the Federal Trade Commission may never get around to the matter; the suit in equity or the cease and desist order operates in respect to the future and does not afford him a

remedy for wrongs endured in the past. And, so long as he lacks his own remedy, lower prices, quantity discounts, special services, benefits of one sort or another denied to him would be available to his stronger competitor. At best, the small merchant can compete only under serious handicaps; at worst he is forced into bankruptcy.

(3) The ruling encourages the trend towards the concentration of economic wealth and power. The Congress has singled out price discrimination as among the most dangerous restraints of trade. The corporation which is in a position to maintain a multiple price structure has the power, among the competing concerns to which it sells; to favor the big as against the little; to widen for the one and to narrow for the other the margin between cost and price; to decree survival or failure among business rivals. To permit the seller to exercise such an irresponsible power to shape the pattern of the national economy is contrary to Congressional intent and public policy.

(4) If this ruling is allowed to stand, a curious result will follow. Instead of the violator revising his system of trade practices to accord with the law, the injured party must adjust its affairs to trade practices which violate it. The victim will be compelled to seek an escape from the squeeze between cost and price which the seller, from which it must purchase, has the power to impose. It may, to secure the lower prices and the special favors essential to survival, become a subsidiary of its larger competitor. Or, more likely, a number of smaller concerns may be forced to form a combination in order to secure treatment equivalent to that accorded "the most favored customer." In either event the move will be towards the result which it is the very purpose of the Robinson-Patman Act to forestall.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945.

No. ——

BRUCE'S JUICES, INC., a Corporation, *Petitioner*,

v.

AMERICAN CAN COMPANY, a Corporation.

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

**1. In an action in a state court to collect promissory notes given as consideration for purchases in interstate commerce at prices which through their discriminatory character tend substantially to lessen competition, may the defendant plead that such notes are unenforceable because the transactions on which they are based violate the Robinson-Patman Act?**

*1. The notes are unenforceable because the transactions on which they are based violate the Robinson-Patman Act.*

The statute invoked here, Par. (a), Sec. 13, Title 15, U. S. C. A., makes it unlawful for any person directly or indirectly to discriminate in price between different pur-

chasers of commodities of like grade and quality, etc. The only exception, as set forth therein, is as follows:

> "*Provided*, That nothing contained * * * shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."

Section 13a makes discrimination between customers by means of discounts or otherwise a crime penalized by fine or imprisonment.

The petitioner, in defense of the action, set up by its pleas that the notes upon which recovery was sought were illegal and unenforceable for the reasons that:

(a) The notes were given in the course of a series of transactions for the purchase of cans; and the transactions were unlawful and the notes unenforceable, because the plaintiff, through its system of prices and otherwise, discriminated among its purchasers, and to the detriment of your petitioner, in violation of paragraph (a) Section 13, Title 15, U. S. C. A. (The Robinson-Patman Act);

(b) The plaintiff discriminated in favor of certain competitors, and to the detriment of petitioner, by furnishing to them equipment for closing cans and other special services and favors, all of which were denied to or charged against petitioner in violation of paragraph (e), Section 13 of the Robinson-Patman Act;

(c) The plaintiff discriminated against petitioner by allowing discounts to purchasers over and above any discounts allowed to defendant, likewise in violation of the federal statute; and

(d) The plaintiff sold cans in Texas for less than in Florida in violation of Section 13a of the Robinson-Patman Act;

the effect of all of which discriminatory prices and trade practices was substantially to lessen competition.

The judge of the Circuit Court for Hillsborough County, Florida, ordered a pre-trial conference for the purpose of exploring the issues. After a great deal of testimony was taken, but before the inquiry was concluded, he invoked the decisions of the United States Supreme Court; insisted that, under these decisions "the contract of sale was not malum per se but malum prohibita"; ruled that the Robinson-Patman Act itself "prescribes the only remedies available to persons affected by its violation"; and held that the defense sought was unavailable. (R. 580). So in a separate opinion, disregarding all evidence relating to the mercantile practices of American Can Company, he entered a so-called summary judgment against petitioner.

This judgment, which narrowed the matter at issue to the question of the validity of the notes, was appealed. The Florida Supreme Court, in a carefully reasoned opinion, categorically held that the pleas presented a legal defense. It therefore reversed the judgment in order "that the issues raised by the pleas as they now stand, or are eventually settled, may be tried." (R. 894). This determination of the issue was directly predicated upon the following decisions of this Court, cited and discussed in its opinion: *Bement & Sons* v. *National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058; *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486; *Pratt* v. *Paris Gaslight & Coke & Coal Co.*, 168 U. S. 255, 18 Sup. Ct. 62, 42 L. Ed. 458; *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 63 Sup. Ct. 172, 87 L. Ed. 165. Of the seven members of the Court, all of whom participated, only two dissented. One of these stated

> "I dissent because I think the sales contract which constituted a part of the plea was free of discrimination and therefore the pleas were of no avail."

Upon rehearing, the Supreme Court of Florida, without affirming or reversing its holding on the federal issue of the availability of the defense sought, voted four to three to

affirm the judgment of the court below. Of the four voting to affirm, one judge was of opinion that as a matter of law the defense sought was not available. Three judges were of opinion that "the defense attempted to be interposed was not available under the facts submitted in evidence to the court below." The three dissenting judges adhered to the former opinion and judgment of the court. Thus, whether the reason was that the defense of a violation of the Robinson-Patman Act was not pleadable in a state court, or whether assuming its availability, petitioner was not under the undisputed facts revealed by the evidence taken entitled to raise it, the Florida Supreme Court passed upon a federal question and disposed of a federal right.

The refusal of the Florida Supreme Court to permit petitioner to interpose the violation of the Robinson-Patman Act as a defense, under the circumstances alleged in the pleas, clearly denied to him a privilege and immunity under the federal statute. The ultimate judgment is subject to challenge for these reasons:

(1) The judgment stands affirmed against petitioner in a state court when, had the identical issue been tried in a federal forum, the defense interposed would have been available and petitioner would have been accorded the right to establish it by evidence.

(2) The effect of the ultimate decision is to deny to petitioner a right which is established by common law and available under the provisions of the antitrust acts.

*2. Restraint of trade as a defense may be plead in an action at law in respect to any violation of the antitrust acts.*

The plea of restraint of trade as a defense in an action at law is one of the oldest and best established of the devices for enforcing the principles later enunciated in the antitrust laws. This defense dates from "time immemorial." A rule against restraints came into the law in the period marked by the break up of the guilds and as a

protest against exclusive privileges that these brotherhoods enjoyed. The common law judges, by hearkening to the defendant's plea of restraint of trade, refused to entertain suits wherein the assistance of the court was sought in creating or maintaining restraints. The defense, as the cases reveal,[4] was available through the whole range of suits brought under the ancient writs. It was particularly appropriate in an action for debt. It was, by the Statute of Monopolies, elevated above the royal prerogative and made the principal instrument by which this famous Act of Parliament was enforced.

The Sherman, the Clayton, the Robinson-Patman Acts are alike in kind, in intent, in the actions they prohibit. The Sherman Act is written in the very language of the common law. The Clayton Act is, technically, a "supplement" to the Sherman Act; the Robinson-Patman Act, an "amendment" to the Clayton Act. The Sherman Act, in terms which are comprehensive, flexible, and adaptable to the changing circumstances of life, sets down the general rule against restraints. The Clayton Act marks out for special attention certain trade practices the effects of which are substantially to lessen competition. The Robinson-Patman Act, elaborating an ancient prohibition to meet the conditions of modern merchandising, singles out price discrimination as particularly dangerous. The common objective of the antitrust laws is the maintenance of the competitive pattern in the national economy.

It is true that the Robinson-Patman Act puts additional teeth in the antitrust laws. But as the novel remedies in

[4] In *The Schoolmaster's Case*, Y. B. Hen. IV, f. 47, pl. 21 (1410), a writ of trespass was refused to two schoolmasters who complained that a third had set up a shop in competition; in the *Meat Market Case*, Y. B. Hen. VI, f. 19, pl. 13; f. 25, pl. 2 (1433), a writ of trespass on the case was refused the Prior of Dunstable against a butcher who, instead of employing my lord's market, sold meat at his own house; in the *Dyer's Case*, Y. B. 2 Hen. V, f. 5, pl. 26 (1415)—here quite in point—a writ of debt was refused John Dyer, against a rival who had bound himself by contract not to use "his art of the dyer's craft." Directly in point is the *Blacksmith's Case*, 3 Leon. 217, 74 Eng. Rep. 643 (1587), where the writ of assumpsit was held not available to one who sought to hold another party to a restrictive covenant.

corporated in the Sherman Act did not abrogate the defenses theretofore existing under the common law, likewise the provision of further remedies by the Robinson-Patman Act did not destroy those already existing. If the Congress had intended to take from the injured party an ancient remedy, the Congress would doubtless have said so.[5]

The elaboration of antitrust law has been constantly attended by an increase in the number of available remedies. To the defense upon which the common law relied, the Sherman Act lifted from the Statute of Monopolies and conferred upon the injured party the right to sue for triple damages. It also, enlisting the government as an agency of police, empowered it in the enforcement of the statute to employ the action for crime, the suit in equity, and the libel against the ware. To this list was added, by the Clayton Act, the cease and desist order as an administrative remedy. And the Robinson-Patman Act, in a number of provisions, made easier the way of proof and correction. The whole history of antitrust legislation reveals a clear intent by the Congress always to strengthen, never to weaken, the prohibition against restraint; to throw additional defenses around the competitive system, not to strip from small business the self-defense, when sued in court, which has been its right from time immemorial.[6]

[5] In fact in the Clayton Act itself—see section 16—the Congress did take from the shipper the right to an action at law in respect to an "unfair" railroad rate and did, specifically, limit legal challenge to the United States Government. In its stead the shipper was given the right of complaint to the Interstate Commerce Commission. The reason for the Congressional denial of the private cause of action was that resort to the courts by every individual who felt aggrieved carried a serious hazard to the administrative process. In this instance exceptional reasons demanded a departure from established practice; and the abridgement of an ancient right was made explicit by the legislature itself. The very writing into the statute of the exception is an acknowledgement that in other cases it stands.

[6] A decision of this Court has allowed the defense of restraint of trade to be interposed in a suit for an infringement of a patent. In that case the conduct prompting the initial legal action, belonging rather to tort than to contract, did not emerge in the course of a transaction between the parties. *Mercoid Corporation* v. *Mid-Continent Investment Co.*, 320 U. S. 661; *Mercoid Corporation* v. *Minneapolis-Honeywell*, 320 U. S. 680.

The history of antitrust shows the Robinson-Patman Act to be an integral part thereof.[7] All through the years the Congress has been sensitive to the effects of the concentration of economic wealth and power; all through the years the Congress has been solicitous lest conditions of survival be made intolerable for "the little fellow." Nothing along the way indicates an intent on its part to regard any of the new remedies it has created as a substitute for the right of a person to plead restraint of trade as a defense. To argue that its acts have closed to the victim of monopolistic practice the one practical and immediate avenue of redress—the right to a defense in his own local court when sued—is to pervert the intent of Congress.

It is submitted that justice in the instant case and important considerations of public policy require the question of the availability of the defense, grounded in the Robinson-Patman Act, to be finally and authoritatively settled.

*3. If the defense sought is denied, the petitioner is left without an immediate and practical remedy.*

In the absence of the defense sought, the small merchant or manufacturer is left without an immediate and practical remedy. The only direct move which he can make is to institute a new suit for triple damages in a federal court. The only other recourse is to file a complaint with the Department of Justice or the Federal Trade Commission. In due course there may—or may not—emerge a criminal action, a suit in equity, or a cease and desist order, seeking to end the abuses from which he suffers. A word about each of these alternative remedies is enough to show its inadequacy as an instrument of personal justice.

[7] In the petions in the courts below American Can Company insisted that the defense sought was not available under the Robinson-Patman Act. There it granted, at least obliquely, that the defense was allowable at common law and admitted the possibility of its being available under the Sherman Act. But it urged that differences between the Sherman and the Robinson-Patman Acts put the defense outside the reach of petitioner. It cannot be determined from the ultimate judgment whether this distinction was accepted or rejected by the court below.

A. *The Suit for Triple Damages.*—At the time of the passage of the Sherman Act, the general belief was that the antitrust laws should be as nearly self-enforcing as possible. But the general reliance then put upon the suit for triple damages has not been vindicated by experience. Even if restraint can be shown, the hazard of a proof of damages remains to be met. The conditions which impel a business enterprise towards growth or decay are many and various; to determine the exact place of the restraint in question among these, and to reduce to pecuniary terms the harm of which it is the cause, imposes on a court an almost impossible task. There is, in fact, little chance for a small business concern to win such a suit against a large corporation, unless the federal government has blazed the way with an action of its own.

B. *The Criminal Action.*—Nor is a criminal action, instituted by the federal government, a remedy upon which a party in the situation of your petitioner can rely. The small concern can file a complaint with the Department of Justice. It has access to no process by which to compel the government to move; and, for any one of a number of reasons, the government may delay action or may never get around to the case. But, if it acts promptly and vigorously, the Department of Justice can not secure to the small business the relief it seeks. It is only as a deterrent that the criminal action is effective; and that does not operate to undo harm done in the past. Even as a future deterrent its efficacy is seriously impaired. For the profits which result from modern forms of restaint, such as price discrimination, are so huge and the penalties for violation of the antitrust laws so small that corporations such as the American Can Company are constantly impelled to take chances.

C. *The Suit in Equity.*—The government's suit in equity is not shaped to the needs of the party in the situation of petitioner. The complaint of the injured person does not institute it; it does no more than inform the Department of Justice. At best the suit, if won, can do no more than en-

join the continuation of illegal practices; it can not be made to reimburse the party wronged for the excess in price already exacted and for the weakening of competitive position which unlawful charges have imposed.

D. *The Cease and Desist Order.*—Almost the same statement is to be made about the cease and desist order. It is not a writ, to which as a matter of right, a party injured by unlawful discrimination has a right. The process leading to its grant is instituted by the Federal Trade Commission; the injured person can do no more than file a complaint. Like the decree in equity, it is preventive of future wrongdoing rather than compensatory of harm already suffered. Its prohibitions may often be circumvented by ingenious revision of the trade practices outlawed. However stern its language, its mandate is in practice no stronger than the system of police with which it is followed up.

There is, therefore, available to the victim of a system of price discrimination only one effective remedy—the defense put forward in this case. If that remedy is held to be within his reach, he is in a position to fight his own legal battle. He may refuse to pay for the goods so long as the price made to him remains unlawful. If the small merchant is not permitted legally to fight back when he is called upon to pay an excess in price over that charged his larger competitor, he is in effect denied the chance of business survival.

If, therefore, the holding in issue here is allowed to stand, the victim of unlawful trade practices is deprived of his one immediate and practical way of fighting back. The state court, by its denial of the remedy sought, in effect interposes its veto to the enforcement of federal law; confers a sanction upon transactions which federal law prohibits; and aids and abets conduct which federal law holds to be a crime.

**II. Are the pleas—as clarified and supported by the unfinished pre-trial conference—sufficient to require the lower court to submit the issues of price discrimination to trial on their merits?**

*1. The allegations in the pleas are sufficient to demand that the issues raised be submitted to trial.*

The question of price discrimination, as presented here, may be resolved into three closely connected issues:

(a) Was the system of prices, with its schedules of discounts, maintained by American Can Company, in violation of the Robinson-Patman Act?

(b) Did price discrimination, other than the regular "quantity discount," attend the operation of American Can Company's system?

(c) Were there, apart from price, other discriminations practiced by the American Can Company?

The quoted system of prices may itself be violative of the Act; or practices which attend purchase and sale may violate the Act by turning quoted prices into fictions.

To explore the sufficiency of the allegations, the pleas of petitioner set forth, with due circumstance and detail, the following types of unlawful discrimination:

(a) That American Can Company engaged in direct discrimination in that the prices charged petitioner were higher than those made to its larger competitors. (R. 4-5)

(b) That American Can Company furnished to certain customers equipment for the closing of cans without cost while it charged the petitioner therefor in violation of Paragraph (e) of Section 13 of the Act. (R. 5)

(c) That discounts of 5% were allowed to the California Packing Corporation and to Stokely Brothers and Company, Inc., both of which have branch plants in Tampa where petitioner's plant is located; and that to petitioner was refused the same—or any discount—on purchases in similar amounts. (R. 6)

(d) That American Can Company illegally favored a number of petitioner's larger competitors—among them the California Packing Corporation, Stokely Brothers and Company, Inc., the Hawaiian Pineapple Company, Libby, McNeil and Libby, Inc., and the Great Atlantic and Pacific Tea Company—by allowing to each of them, and denying to petitioner, discriminatory discounts of from 3% to 5% on all purchases. (R. 6-7)

(e) That from its factory at Tampa, Florida, the American Can Company delivered cans without cost to the plants of the California Packing Corporation and of Stokely Brothers and Company, Inc., while petitioner was required to pay all delivery charges. (R. 6-7)

(f) That the American Can Company sold cans in Texas at prices lower than those exacted in Florida in violation of Section 13a of said Act. (R. 7)

These pleas set forth in detail facts which, if true, show beyond question the violation of various sections of the Robinson-Patman Act. To decide otherwise would be to hold that conduct in direct violation of statute, and by Section 13a made punishable by fine and imprisonment, is lawful.

*2. The testimony taken at the unfinished pre-trial conference, instituted for the sole purpose of exploring and clarifying the issues to be tried, discloses no undisputed facts or admissions by petitioner which would justify a summary judgment in the absence of trial.*

In response to the defense put forward, counsel for the American Can Company sought, through a series of motions, to attach compulsory amendments to petitioner's pleas, alleging a great many additional facts. At this point the trial judge discovered that—with the initial question, the federal issue raised, and the amendments proposed to the defendant's pleas—the case was becoming unusually complicated. Accordingly, on his own motion, he ordered a pre-trial conference. Its purpose was "to simplify the

issues . . ., to determine the necessity or desirability of amending the pleadings, to obtain admissions of facts and of documents which will avoid unnecessary proof, and to limit the number of witnesses." The order further provided "that either party . . . is authorized and empowered to take necessary depositions . . ." Objections to proposed interrogations were to be ruled on by the court before any witness was required to answer. (R. 37-39).

At this pre-trial conference the facts disclosed by the evidence—so far as it was taken—failed to show any admission by petitioner which would justify a summary judgment. Instead, the evidence introduced, incomplete as it was, established a prima facie case in respect to many of the discriminations complained of. (R. 65-83; 402-505). The officials of the American Can Company admitted a lack of uniformity in respect to the equalization of freight charges between competitive points. (R. 148). They admitted that freight deductions were sometimes allowed "for other reasons which we are able to determine," (R. 149); that the profits of "equalization" and even of "special rates" were given to special customers and withheld from others; that such favors continued during the life of the contract with the particular purchaser (R. 172-173); that usually such concessions were made orally, though once in a while confirmed by letter. (R. 173). A request was made by petitioner for the production of letters revealing the favored customers; the witness was instructed by counsel not to answer; the question was certified to the trial court. (R. 172-3). It was also admitted that substantial discounts were allowed solely on the basis of aggregate quantity sales. (R. 282).

At the taking of depositions in New York, American Can Company produced the form contracts. (R. 109). In these contracts the nature of the price structure and the provisions for quantity discounts were set forth. An exposition of the whole pricing system was also given by officials of the company. (R. 209-219, 234-245, 506-507, 571-579.) By

edules, discounts running from 1% upon annual
s of $500,000.00 to 5% upon annual pur-
$7,000,000.00 or more were established. These
were to be calculated upon the aggregate
sales to the particular customer, irrespec-
he number or the location of the plants from
merchandise was shipped. A number of your
's larger competitors, operating plants in many
f the country, were receiving their supply of cans
ral of the American Can Company's factories. A
ample, put in evidence (R. 240-243), indicates the
s imposed by this system of cumulative quantity
upon the small purchaser.

pa, Florida, is located the canneries of Bruce's
nc., and of other independents. There, too, are
lants of the California Packing Corporation and
y Brothers and Company. The contracts under
these concerns are supplied are identical. Peti-
ys from the American Can Company's plant in
quantity approximately equal to the amounts sold
these larger competitors. Yet petitioner receives
nit while the California Packing Corporation re-
iscount of 5% upon orders of the same size. It is
, under such an arrangement, the product of an
ent can not compete on equal terms, even within its
ket, with the nation wide brand. When it is re-
l that the canning business is one of great volume
profit and that the cost of cans often runs as high
f the factory cost of the product, it becomes ap-
hat survival becomes almost impossible for the
ependent canner.

occasions counsel for the American Can Company
(R. 102, 367), that the burden was upon it to
uch practices as coming within the scope of the
which the law permits. Its chief counsel, Mr.
his testimony explained that the system of quan-
unts was set up when the Robinson-Patman Act

was passed; that it represented an estimate of some of the officers of the company; and that it rested neither upon cost accountancy nor upon actual experience of reduction of cost with quantity of sale. He also stated that the practice was an attempt to bring the system within the exception set down in the statute. He went so far as to admit that the policy of the company was prima facie a violation of the Robinson-Patman Act and that the burden of proof rested upon his company to justify the quantity discount as grounded in savings through quantity sales. (R. 571-578).

The system of discounts deserves a further word. Instead of adjusting discounts to savings in cost with volume of sales, it sets up a classification of customers. And customers are classified, not by the relative expense incurred in serving them, but on the sheer dollar volume of their purchases. All customers whose purchases run to less than $500,000.00 a year receive no discount; those whose purchases are between $500,000.00 and $7,000,000.00 receive from 1% to 4% discount; those whose purchases amount to or exceed $7,000,000.00 receive a 5% discount. As a result expenses are not apportioned by customer or even by plant; they are hypothecated for the class of customer. (R. 241). For example, against the small purchasers is set down an item of expense for "commissions," although it is admitted that in Florida no commissions were required to be paid. (R. 510, 576). It is hard to fashion a price system better calculated to serve the ends which it was the purpose of the Robinson-Patman Act to prevent.

It is submitted that such contracts, on their very face, violate the prohibition of the Robinson-Patman Act. Repeatedly they have been so held by the Federal Trade Commission. Simmons Company, Docket No. 3840; Master Lock Company, Docket No. 3386; H. G. Brill Co., Inc., Docket No. 3299; American Optical Company, Docket No. 3332.

When a prima facie case of discrimination is shown, the burden of proof to justify the practice rests upon the accused corporation. It must, by a showing of lower cost with

volume of sales, demonstrate that the quantity discount falls within the exception permitted by law. *American Can Co.* v. *Ladoga Canning Co.*, 44 F. (2d) 763 (C. C. A. 7th). See also *Swift & Co.* v. *Wallace*, 105 F. (2d) 848 (C. C. A. 7th); *Oliver Bros., Inc.* v. *Federal Trade Comm.*, 102 F. (2d) 763 (C. C. A. 4th); *Hansen Packing Co.* v. *Armour & Co.*, 16 F. Supp. 784 (S. D. N. Y.)

Moreover, the system of cumulative quantity discounts in issue here is a discrimination analagous to "the basing point pricing system" held unlawful alike by the Federal Trade Commission and by this Court. *Federal Trade Commission* v. *A. E. Staley Manufacturing Co.*, —— U. S. ——, No. 559 (Apr. 23, 1945), 65 Sup. Ct. 971; *Corn Products Refining Co.* v. *Federal Trade Commission*, —— U. S. ——, No. 680 (Apr. 23, 1945), 65 Sup. Ct. 961.

In the pre-trial conference your petitioner made every effort to secure access to all the facts and documents which would clarify and make concrete the issues presented by its proposed defense. To that end it attempted to obtain certain depositions from certain officials and representatives of American Can Company and to examine the records of the corporation. In this endeavor, however, petitioner was largely frustrated. The questions concerned the prices, the discounts, and the trade practices of the American Can Company as they affected petitioner and its larger competitors. Objection was taken to all questions and officials of the corporation were instructed by counsel not to answer. The company took position that its dealings with petitioner's large competitors were "confidental" and therefore beyond judicial inquiry. A fair sample of such questions and the responses which they provoked is set forth in Appendix, pp. 34-37.

Issue was taken by the defendant with this attitude and these instructions to witnesses on the part of representatives of the American Can Company. The attorney for petitioner voiced his objections in these words:

"The attorney for defendant wishes to point out to attorneys for the plaintiff that by this instruction and by the instructions yesterday they are avoiding the entire benefits which the court desired to be obtained by this hearing; they have examined the president of Bruce's Juices, Mr. J. Adams Bruce, and went fully into all matters in connection with his transactions and his business; that they are now refusing to permit the defendant the same general type of examination.

"Further, that the issue in this case is whether or not the transactions upon which the notes in question are based as their consideration were illegal under the Robinson-Patman Act on account of discriminations; and to refuse to give us any information on the point prevents us from showing such discriminations, when such information is readily available in the office of the American Can Company here in New York and when it is not contended it is not available.

"I particularly point out, so that counsel if they see fit may change their position, as an example of that, refusing to permit the witness to answer the question and give information as to the amount of discount each of the customers, corporations, of packers' cans referred to yesterday obtained during the years in question, in other words, not permitting us to ascertain whether or not such competitors, corporations, obtained one per cent or five per cent under their quantity discount." (R. 174-175).

And, on several occasions, petitioner called the attention of the presiding judge to the fact that depositions had not been completed and that objections to questions certified to the court had not been ruled upon. It also asked for an opportunity further to examine the officials of the American Can Company after the court had ruled upon these objections. (R. 457-458).

But, while the pre-trial conference was under way, before the taking of testimony was concluded, and with motions before the court upon which there had been no rulings, the presiding judge brought the proceeding to an abrupt close. He had reached the conclusion—and ruled—that as a matter

of law the defense sought to be interposed was not allowable in a state court. As he put it:

> "As to the defense of illegality of consideration or unlawfulness of the notes under the Federal Statutes, hereinabove mentioned, I am of the opinion that under decisions of the Supreme Court of the United States such defense cannot be offered in a suit to collect the purchase price of merchandise sold and delivered and affected by the provisions of that act. The act itself prescribes the only remedies available to persons affected by its violation and no other method of relief is to be had. The contract of sale was not under these decisions Malum in se but Malum prohibita only.
>
> "I am, therefore, of the opinion that all questions of fact and law on which the rights of the parties depend are settled in favor of the plaintiff." (R. 581-582)

Thus the sole defense upon which petitioner relied was laid to one side as irrelevant. It was thus unnecessary to consider evidence in respect to any of the pleas put forward, to rule upon any motion of defendant, or to pass upon any objection raised by American Can Company. It was thus only by ruling out the federal issues and all that related thereto that no facts were left in dispute. Petitioner acknowledged the notes to be valid and due; the court issued a "summary judgment"—for which the statutes of Florida make no provision—in favor of the plaintiff.

It is clear, therefore, that nothing in the testimony points to any admission by petitioner which deprived it of a right to the defense sought. On the contrary the evidence, incomplete as it is, reveals a prima facie case upon which petitioner is entitled to go to trial.

In respect to the federal issues raised by that prima facie case there were no findings of fact upon which the Florida Supreme Court could base a summary judgment against the petitioner.

**III. Is a right established by Federal Law abridged or denied in this case by a serious departure from proper process in a State Court?**

As the case has been argued, it may not be necessary for the Court to consider this question. But a word is demanded because the decision below was affirmed by the Florida Supreme Court by a divided bench, and in memorandum opinions. The result could properly have been reached, either by holding:

(1) That, as a matter of law, the defense sought to be interposed was not available in a state court; or

(2) That the undisputed facts disclosed by the pre-trial conference were not sufficient as a matter of law to constitute a defense.

One of the majority of four, seven judges sitting, held that the defense sought was not available in a state court. The other three, in a "per curiam" opinion, held that "The defense sought to be interposed was not available under the facts submitted in evidence to the court below." This, it seems clear, must be interpreted to mean that from the undisputed facts disclosed at the pre-trial conference the three judges concluded that as a matter of law the price system of American Can Company, and the trade practices attending its operation, did not violate the Robinson-Patman Act. Thus, whichever of the two be taken as the ground of judgment, a federal issue is presented.

However, if the "per curiam" opinion of the three judges is to be interpreted to mean that the Supreme Court of Florida was weighing conflicting evidence and deciding issues of disputed facts, it does abridge and deny a federal right by a serious departure from legitimate and proper process. The pre-trial conference was set up to clarify, not to resolve, issues in dispute. Furthermore, quite apart from the purpose it was intended to serve, the proceeding lacks all essentials of a fair trial of disputed issues. American Can Company refused in as many as fifty-five instances to produce documents or to permit cross-examination of

witnesses. In Appendix, pp. 34-37, are quoted typical examples which reveal the absence of the essentials of a judicial hearing with respect to a finding on any disputed issue of fact.

If, therefore, the three-judge memorandum be interpreted as deciding any disputed issue of fact, it presents a case in which petitioner has been stripped of a federal right without proper trial of the disputed issues of fact on which that right is founded.

## CONCLUSION.

It follows that from any possible interpretation of the opinion of the Supreme Court of Florida, affirming the trial court without majority agreement on any single theory, your petitioner has been denied a federal right. The clarification of the limits of the federal right involved in this case is of far-reaching public and economic importance. If the defense sought is not available to independent business concerns which are victims of discriminatory trade practices, the competitive position of industry the nation over will be seriously impaired and public policy as manifest in a federal statute defeated.


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## APPENDIX.

### Illustrations of Failure to Produce Records or Permit Examination.

"Q. Will you produce from the records of your corporation—and this is the general office of the American Can Company—a list of the cans purchased by the various canning plants of the California Packing Company that purchased packers' cans in 1937, 1938, 1939, 1940, 1941 and 1942, and showing likewise from which plant or warehouse, referred to as distributing point, of the American Can Company these cans were delivered?

A. You are referring now only to those sizes that are competitive with the sizes purchased by Bruce's Juices?

Q. No, sir, I am referring to all cans referred to as packers' cans.

Mr. Allison: To the question or request as propounded the plaintiff objects for the reason that its scope goes beyond the present or possible future issues of this cause; it is to that extent immaterial and irrelevant.

Further, that the scope of the question seeks disclosure of confidential business matters between the plaintiff and (fol. 178) other customers which are not subject to disclosure without consent of such customers." (R. 134-135)

"Q. Mr. Nugent, what was the amount of packers' cans purchased by the California Packing Corporation and delivered at that company's plant at Tampa, Florida, in year 1942?

Mr. Allison: To which question the plaintiff objects upon the ground that it seeks disclosure of confidential business relations with a customer other than the defendant and goes beyond the scope of this inquiry.

And the witness is instructed to refuse to answer the question, and the propriety of the question is certified to the Circuit Court for decision." (R. 138)

"Q. Do you know how many customers, the total amount of the purchases of the customers who did not receive discounts?

A. It is in the records, but I do not know offhand.

Q. Will you produce that figure for us?

Mr. Callahan: That question is objected to as immaterial, incompetent and improper and not within the scope of this examination or the issues involved in this suit.

The witness is instructed not to answer the question, and the propriety of the question is certified to the Circuit Court for ruling." (R. 237)

"Mr. Fowler: Gentlemen, I intend to ask this witness and likewise perhaps supplement the information which I seek to obtain from this witness by the evidence of Mr. George Madge, assistant comptroller of the American Can Company, now in this room, questions in substance as follows: to produce the invoices for the sale of cans to each of the corporations enumerated repeatedly in these proceedings for each year covered by this investigation, including the part of the year 1936; to produce the ledger sheets showing the amount of total charges made to each of these (fol. 321) customers for each separate year—and when I say each year hereafter it will be intended to mean

from June 19, 1936, to the end of that year as being included in one of those years—which ledger sheet or other record shows the total charges for cans made against each of these corporations, the amount of cash payments and the amount of discounts and allowances and credits which make up the difference between the cash payments and the total amount of such charges; and if allowances and discounts and credits other than cash are disclosed, to investigate the details thereof.

Mr. Allison: It is further informally understood that should the foregoing questions be propounded to the named witnesses, or to any officers or employees of the plaintiff, called by defendant, the plaintiff would object to such questions, except as to the following corporations, to wit: Border Packing Corporation, Engelman Products Company and Taormino Corporation, for the reason that the same are immaterial and irrelevant to the issues and possible issues in this cause, that the same are beyond the scope of the order of court, and that the same constitutes a fishing expedition into the records of the plaintiff in support of its pleas, which effort goes beyond the purview of the statute sought to be invoked thereby, and seeks to make available to the defendant for his information and benefit confidential business relations with competitor customers of the plaintiff.

And the plaintiff announces that it would and will instruct any and all witnesses to decline to answer the foregoing questions as to the five corporations, other than the three above named, and certifies the question to the Circuit Court for determination as to its propriety and admissibility." (R. 244-245)

"Mr. Callahan: In so far as an examination of Exhibits 10 to 14 is concerned the company will permit an examina-

tion of its records in so far as we are permitted to do so by customers of this corporation.

Mr. Fowler: Naturally that would be of no value to us. If it is so restricted we cannot obtain the information. In other words it is our contention that that proviso is equivalent to a declining to permit us to do so.

Mr. Callahan: In view of the position taken by counsel it is my judgment that the question be certified to the Circuit Court for determination as to its propriety, and the witness is instructed not to answer." (R. 239).

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945.

No. 27

BRUCE'S JUICES, INC., a Corporation, *Petitioner*,

v.

AMERICAN CAN COMPANY, a Corporation.

On Writ of Certiorari to the Supreme Court of the State of Florida.

## BRIEF FOR BRUCE'S JUICES, INC., PETITIONER.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945.

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No. 402.

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BRUCE'S JUICES, INC., a Corporation, *Petitioner*,

v.

AMERICAN CAN COMPANY, a Corporation.

---

**On Writ of Certiorari to the Supreme Court of the State of Florida.**

---

## BRIEF FOR BRUCE'S JUICES, INC., PETITIONER.

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*To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.*

### OPINIONS BELOW.

The opinion of the Florida Supreme Court, following the first hearing, is reported in 22 So. 2d 461, and appears in R. 593. The judgment, after reargument, is reported in 22 So. 2nd 461, 465, and appears in R. 621. The order denying a second re-hearing is reported in R. 622.

## JURISDICTION.

The final judgment of the Florida Supreme Court, R. 621, was delivered April 17, 1945. An order staying the mandate pending proceedings in this Court was entered June 30, 1945. (R. 622).

The jurisdiction of this Court is invoked under Section 344(b), Title 28, U. S. C. A., (Jud. Code, Sec. 237), the petitioner having been denied a right, privilege, or immunity specifically set up and claimed under a federal statute, to wit: Sections 13 and 13a of the Robinson-Patman Act, Title 15, U. S. C. A.

## SUMMARY STATEMENT OF THE MATTER INVOLVED.

Bruce's Juices, Inc., is an independent processor of fruit juices operating a plant in Tampa, Florida. It sells its products in a number of states which can be economically supplied from that base. Over a period of years it bought containers for its use from American Can Company. Its annual purchases from that company amounted to about $350,000.00. (R. 110).

The American Can Company is the world's largest manufacturer of cans. Under a central management it operates plants and warehouses in twenty-five states (including a plant at Tampa) in order most effectively to meet competition in each area. (R. 320). Its costs in these several plants, dependent as they must be upon varying circumstances of production, are different. American Can Company supplies the containers used by the larger competitors of your petitioner which sell not only in petitioner's market, but on a nation wide scale. Among them are California Packing Corporation (Del Monte brand); Stokely Brothers and Company (The Van Camp brand); Hawaiian Pineapple Company; Libby, McNeil & Libby; and the Great Atlantic and Pacific Tea Company. (R. 111-112). These large competitors, purchasing from the same com-

pany as your petitioner, are supplied, not from a single plant, but from plants located all over the country. Their aggregate annual purchases, scattered among many plants, amount to many millions of dollars each. California Packing Corporation alone buys more than $7,000,000.00 in cans each year from American Can Company. (R. 200-201).

The contracts under which American Can Company supplies cans both to your petitioner and to its larger competitors are practically identical. (R. 106-108). The quoted prices are subject to a sliding scale of discounts based upon total annual purchases, irrespective of whether the orders are filled from one or many plants. These discounts run from 5% if the annual purchase is over $7,000,000.00 down to 1% on a $500,000.00 annual purchase. No discounts are allowed for quantities under $500,000.00. (R. 129). The practice of basing discounts upon such aggregate purchases instead of upon orders filled from a single plant does not reflect differences in costs. The respondent claims no difference in manufacturing expense between large and small orders. (R. 102). It claims justification in higher sales cost to the small purchaser; but admits that such "estimates" rest upon no adequate empirical data. (R. 572-574). The avowed classification of customers is allowed to stand without the kind of legal justification demanded by the Robinson-Patman Act.

The effect of the system is seriously to handicap the independent company selling in competition with a corporation which operates a number of widely scattered plants. The situation presented by this case is an excellent example of how such a system discriminates. In Tampa, Florida, is located the canneries of Bruce's Juices, Inc., and of other independents. There, too, are located plants of the California Packing Corporation and of Stokely Brothers and Company. The contracts under which all these concerns are supplied are identical. Petitioner buys from the American Can Company's plant in Tampa a quantity approximately equal to the amounts sold to each of

these larger competitors. Yet petitioner receives no discount while the California Packing Corporation receives a discount of 5% upon orders of the same size. It is clear that, under such an arrangement, the product of an independent can not compete on equal terms, even within its own market, with the nation wide brand. When it is remembered that the canning business is one of great volume and small profit and that the cost of cans often runs to a very high percentage of the factory cost of the product,[1] it is clearly evident that survival becomes almost impossible for the small independent canner. It is a direct invitation, indeed a compulsion, toward the merger of independent local canners into one or more combinations or toward their absorption by corporations which sell on a nation wide scale. For example, if the California Packing Corporation should acquire Bruce's Juices, Inc., the petitioner, through the very fact of operating as a part of a larger corporate imperium, would immediately be entitled to the 5% discount which is now beyond its reach.

The case at bar arose out of the competitive hardship imposed by the system of discounts outlined above. Ever since the passage of the Robinson-Patman Act your petitioner has had a continuing account with American Can Company under which for the period from 1937 to 1942 only it has paid more than $2,000,000.00 for cans. (R. 110).

[1] For example, in a case involving this same respondent, *American Can Co.* v. *Ladoga Canning Co.*, 44 F. (2d) 763, at page 766, the Circuit Court of Appeals for the Seventh Circuit found the following with respect to the cost of cans:

> "The jury was justified in finding, or at least there was evidence sufficient to support such findings, that the discount amounted to 18 per cent. of the price paid by Van Camp; that Van Camp purchased during the period covered by the suit some $18,000,000 worth of cans; that the cost of the tin can is an important item in packing costs, amounting to nearly one-third of the entire cost and in some instances equals or exceeds the cost of the food material placed in the can; that 2½ cents per case was the usual profit to the packer on winter packed goods, and the price discount granted Van Camp was a material factor in the sale of the finished product."

Prior to the institution of this suit it owed a balance on this account of about $114,000.00 which was substantially represented by promissory notes. Your petitioner had repeatedly protested against the system of price discrimination and against other special favors to its larger competitors. (R. 83). As antecedent to a settlement of its account, it asked for an adjustment on the basis of the equality of treatment demanded by federal law; but no relief was given. Instead American Can Company brought the present suit on the promissory notes. It thus sought to enlist the aid of the Florida Courts in policing its system of discriminatory prices and competitive handicaps.

The sole defense to this action finally relied on by petitioner was that the renewal notes sued on were illegal and unenforceable, since the excess in price imposed upon your petitioner above that charged its larger competitors was in violation of the Robinson-Patman Act. It was, therefore, plead that such excess—represented substantially by the aggregate sum of the notes—was not lawfully due. In respect to the defense sought to be interposed, no issue of fact was ever tried.

Proceedings in the lower court were limited to a pre-trial conference instituted by the court on its own motion. (R. 37, 57). Its sole purpose, in accordance with the ruling Florida decision,[2] was to ascertain whether amendments should be made to the pleadings and to narrow and clarify the issues in controversy. (R. 37-39, 57-59). To this end testimony was heard and depositions were taken. It was not, and it was never intended to be, a trial of issues of fact. The record here, voluminous as it is, is to be considered in the light of the function it was intended to serve. The taking of testimony, both upon the discriminations of American Can Company, including its price policies, and upon its alleged justification, was never completed. In respect to these issues the plaintiff refused to answer ques-

[2] *Hillsborough County v. Sutton*, 150 Florida 601, 8 So. 2nd 401 (1942).

tions, and its refusals were never ruled on by the court. (R. 457-458, 460, 578-579). The trial judge gave no official consideration to this incomplete body of evidence; in respect to the issues touched off by your petitioner's plea of price-discrimination, he made no findings of fact.[3] Before the pre-trial conference was completed he came to the conclusion that, as a matter of law, the defense that the contract violated the Robinson-Patman Act was not available in a suit in a state court. He held, in the light of that ruling, that there was no purpose in completing the testimony, (R. 581), and entered judgment against petitioner in the sum of $122,798.60. (R. 584-585).

From this judgment your petitioner took an appeal to the Supreme Court of Florida. Its allegations of error, some eight in number, were concerned in one way or another with rulings—or failures to rule—in respect to the plea of a violation of the Robinson-Patman Act which the defendant sought to interpose. (R. 588-589). There were no findings of fact by the trial judge in respect to any of the disputed price-practices; and, in fact, within this realm of discrimination and justification, there were no findings in respect to which an appeal could have been taken. After argument, and in a carefully considered opinion, the Supreme Court of Florida, two of the seven judges dissenting, reversed the ruling of the trial court. It held that the defense of a violation of the Robinson-Patman Act was available to your petitioner; that at the end of a pre-trial conference a summary judgment was "proper" only where "material facts were not controverted"; and that there was "much in the record to indicate that issues of fact were not absent if testimony relative to the pleas were to

[3] We are resolving this question in favor of respondent. It could well be argued that the trial court held by its statement "The contract of sale was not under these decisions Malum in se but Malum prohibita only" that the admitted contracts under which American Can Company did business violated the provisions of the Robinson-Patman Act.

be considered."[4] It, therefore, remanded the case for trial of the issues raised by that defense. (R. 593-601. Also printed as Appendix A to this brief).

After a rehearing the Supreme Court of Florida, by a vote of four to three, affirmed the judgment of the court below, ignoring its former ruling. Three judges out of seven, in a so-called *per curiam* opinion, without citation of authority or recitation of reasons, held that "the defense attempted to be interposed was not available under the facts submitted in evidence to the court below and, therefore, the judgment should be affirmed." One judge insisted that he had "come to the conclusion that the subject matter of the pleas" was "not legally available as a defense in the state courts in a common law suit on the promissory notes involved." He, *therefore*, concurred "in the conclusion that the judgment of the Court below should be affirmed." (R. 621). The three remaining judges adopted as their dissenting opinion the original opinion rendered by the court. (R. 621. Also Appendix A to this brief). Thus four judges, differing in their interpretation of the law, voted to affirm the judgment of the court below. A rehearing asked by the defendant was denied, (R. 622), thus leaving to your petitioner no remedy save a petition to this Honorable Court.

[4] The ruling Florida case is *Hillsborough County* v. *Sutton*, 150 Florida 601, 8 So. 2d. 401. There the court said, "If the controversy progresses to the point of eliminating all questions of fact then the court may give judgment according to law on the facts before him." The court in the instant case commented, "It appears to have been the ruling that such method was proper where material facts were not controverted." (R. 600). The first opinion, in which this language occurs, was never withdrawn.

## QUESTIONS PRESENTED.

1. **In an Action in a State Court to Collect Promissory Notes Given as Consideration for Purchases in Interstate Commerce at Prices Which Through Their Discriminatory Character Tend Substantially to Lessen Competition, May the Defendant Plead That Such Notes Are Unenforceable Because the Transactions on Which They Are Based Violate the Robinson-Patman Act?**

This question does not require the Court to decide that the entire transaction is so tainted with illegality that the seller cannot collect even the fair value of the goods, thus giving the buyer a windfall. The question can, of course, be answered on the broad ground that a transaction unlawful under the Robinson-Patman Act constitutes criminal conduct upon which no money judgment can be based.

But, if it be admitted that the buyer is entitled to the fair value of the goods, petitioner's defense can be sustained on a narrower ground. It is that narrow ground which is actually presented by the record. There is here, on the part of the respondent, no mere demand for the fair value of its merchandise. Instead the record of the unfinished pretrial conference suggests the strong probability that petitioner has already paid the fair value based on prices at which American Can Company sells to its larger competitors. This is, in fact, not a suit for debt lawfully due. It is rather an action to enforce a system of prices and trade practices which, through its departures from equality of treatment, has prevented and still prevents petitioner from competing on equal terms with its more favored rivals. If, in separate actions brought against individual purchasers, state courts can enforce the collection of discriminatory prices, they can defeat the entire purpose of the Robinson-Patman Act. By denying such a defense as is sought here, they can make secure a widespread system of mercantile discrimination. Thus, by their very judgments, state courts can put a sanction on transactions forbidden by federal law.

By obtaining a judgment in this case American Can Company has secured the aid of a state court in effectuating the objective which the Act specifically condemns. Thus the state court has become an active instrument in injuring, lessening and preventing the market competition which it is the very intent of the antitrust acts to keep alive.

**2. Are the Pleas—As Clarified and Supported by the Unfinished Pre-Trial Conference—Sufficient to Require the Lower Court to Submit the Issues of Price Discrimination to Trial on Their Merits?**

The record represents the proceedings of an unfinished pre-trial conference. It is put forward to show that the plea of violation of the Robinson-Patman Act which petitioner sought to interpose in the action brought against it is substantial and not frivolous. It is introduced for the sole purpose of demonstrating that the defense sought raises a series of important federal questions upon which petitioner is entitled to a trial at law.

The larger question breaks into three separate questions:

(1) Were the allegations by petitioner of discriminatory practices in violation of the Robinson-Patman Act sufficient to require their submission to trial by law?

These allegations, supplemented by the pre-trial conference, disclosed the following illegal practices:

(a) Contracts between the American Can Company and the competing customers to whom it sells at prices highly discriminatory on their face in violation of the Robinson-Patman Act.

(b) Departures from the quoted prices, e.g., sale of cans in Texas at prices lower than those made to petitioner, in violation of that statute.

(c) Favors and special services, such as equipment for closing cans and "freight equalization", withheld from

petitioner without extra payment and rendered without cost to its larger competitors, in violation of that Act.

(2) Was the so-called system of "quantity discounts" to be justified by differences in costs,[5] or was it in effect a system for the classification of customers by size which it was the intent of the Robinson-Patman Act to forbid?

(3) Did petitioner, at the pre-trial conference, make such admissions as to forfeit its right to have the issues submitted to a trial at law; or, on the contrary, were such admissions made by the respondent as to invite a summary judgment on the plea of price-discrimination in favor of your petitioner?

### 3. Is a Right Established by Federal Law to be Abridged or Denied by Serious Departures From the Ordinary Requirements of Proper Process in a State Court?

Petitioner grants that, within the most tolerant limits, the highest court of a state is free to shape its own judicial procedure and to review the judgments of its lower courts in its own way. Nor does it question the right of the Florida Supreme Court, in a cause which involves only state law, to exercise a wide discretion in respect to its employment of the device of summary judgment. It does, however, insist that under our system of government, the right of the litigant to a defense grounded in federal law is not to be denied or abridged by a procedure which departs as radically from the minimum requirements of proper process as that recited in the pages which follow.

## STATUTE INVOLVED.

The statute involved is the Robinson-Patman Act, (Sections 13 and 13a, Title 15, U. S. C. A.), relevant parts of which are printed in full as Appendix B to this brief.

[5] In accordance with the proviso contained in Paragraph (a), Section 13, Title 15, U. S. C. A., (The Robinson-Patman Act).

## SPECIFICATIONS OF ERRORS TO BE URGED.

The Florida Supreme Court erred:

(1) In holding that the defense of illegality based on violation of the Robinson-Patman Act cannot be plead in an action in a state court, thus permitting enforcement of a contract which violated federal law.

(2) In ultimately affirming the judgment of the trial court that the Robinson-Patman Act "prescribes the only remedies available to persons affected by its violation" and that "under the decisions of the Supreme Court of the United States such defense cannot be offered in a suit to collect the purchase price of merchandise sold and delivered and affected by the provisions of that act."

(3) In affirming the judgment of the trial court in disregard of its first opinion and judgment sustaining the availability of the plea of violation of the Robinson-Patman Act.

(4) In denying to petitioner a right established by federal law without permitting petitioner an opportunity to make good its plea by the completion of the trial at law.

(5) In disregarding the rule in respect to the burden of proof which is an essential part of the federal right established by the Robinson-Patman Act.

(6) In giving effect to a minority opinion which sanctions a system of prices on its face discriminatory.

(7) In making a judgment which in effect treats a classification of customers by size as if it were a legally justifiable system of quantity discount.

(8) In not ruling that the standard contracts of American Can Company are on their face in violation of the Robinson-Patman Act.

(9) In refusing to remand to the Circuit Court of Hillsborough County, Florida, for trial the issues of fact raised by the defense sought to be interposed by petitioner.

## ARGUMENT.

### I. The Ultimate Judgment of the Florida Supreme Court, in Which It Records Its Answer to an Appropriate Federal Question, has no Support in the Law of the Land.

1. *The Florida Supreme Court has denied to your petitioner its right to a proper federal plea.*

The right invoked by your petitioner is established by the Robinson-Patman Act, paragraph (a), Section 13, Title 15, U. S. C. A., which makes it unlawful for any person directly or indirectly to discriminate in price between different purchasers of commodities of like grade and quality, etc. The only exception, as set forth therein, is as follows:

> "*Provided*, That nothing contained * * * shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."

Although its prohibition is somewhat narrower, Section 13(a) makes it unlawful for any person engaged in commerce knowingly to be a party to any transaction which discriminates in favor of the competitors of the purchaser by means of any discount, allowance or otherwise. And a violation of this provision is made a crime to be punished by fine or imprisonment.

Petitioner defended the action against it in the Circuit Court for Hillsborough County, Florida, on the ground that the notes upon which recovery was sought were illegal and unenforceable for the following reasons:

(a) The notes were given in the course of a series of transactions for the purchase of cans; and the transactions were unlawful and the notes unenforceable, because the plaintiff, through its system of prices and otherwise, discriminated among its purchasers and to the detriment of

your petitioner, in violation of paragraph (a), Section 13, Title 15, U. S. C. A. (The Robinson-Patman Act);

(b) The plaintiff discriminated in favor of certain competitors, and to the detriment of petitioner, by furnishing to them equipment for closing cans and other special services and favors, all of which were denied to or charged against petitioner in violation of paragraph (e), Section 13 of the Robinson-Patman Act;

(c) The plaintiff discriminated against petitioner by allowing discounts to its more favored purchasers over and above any discounts allowed to petitioner, likewise in violation of the federal statute; and

(d) The plaintiff sold cans in Texas for less than in Florida in violation of Section 13a of the Robinson-Patman Act; the effect of all of which discriminatory prices and trade practices was substantially to lessen competition.

The judge of the Circuit Court for Hillsborough County, Florida, ordered a pre-trial conference for the purpose of exploring the issues. After a great deal of testimony was taken, but before the inquiry was concluded, he invoked the decisions of the United States Supreme Court; insisted that, under these decisions "the contract of sale was not . . . Malum in se but, Malum prohibita only";[6] ruled that the Robinson-Patman Act itself "prescribes the only remedies available to persons affected by its violation"; and held that the defense sought was unavailable. (R. 580, 582). So, in an opinion, which disregarded all testimony relative to the mercantile practices of American Can Company, he found for the plaintiff and entered a so-called summary judgment against petitioner.

This judgment, which narrowed the matter at issue to the question of the validity of the notes, was appealed. The Florida Supreme Court, in a carefully reasoned opinion, categorically held that the pleas presented a legal defense.

[6] As we pointed out in Footnote 3, *supra*, this may well be construed as a finding of fact against American Can Co.

It therefore reversed the judgment in order "that the issues raised by the pleas as they now stand, or are eventually settled, may be tried." (R. 593, 601). This determination of the issue was directly predicated upon the following decisions of this Court, cited and discussed in its opinion: *Bement & Sons* v. *National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058, (1902); *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486, (1909); *Pratt* v. *Paris Gaslight & Coke Co.*, 168 U. S. 255, 18 Sup. Ct. 62, 42 L. Ed. 458, (1897); *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 63 Sup. Ct. 172, 87 L. Ed. 165, (1942). Of the seven members of the court, all of whom participated, only two dissented. One of these two, disregarding the issue of the availability of the defense sought, predicated his dissent upon the factual ground that "the sales contract which constituted a part of the plea was free of discrimination" and that "therefore the pleas were of no avail."

Upon rehearing, the Supreme Court of Florida, without affirming or reversing its holding on the federal issue of the availability of the defense sought, voted four to three to affirm the judgment of the court below. Of the four voting to affirm, one judge was of opinion that as a matter of law the defense sought was not available. Three judges were of opinion that "the defense attempted to be interposed was not available under the facts submitted in evidence to the court below." The three dissenting judges adhered to the former opinion and judgment of the court. Thus, whether the reason was that the defense of a violation of the Robinson-Patman Act was not pleadable in a state court, or whether—assuming its availability—petitioner was not under the undisputed facts entitled to raise it, it is clear that the Florida Supreme Court passed upon a federal question and disposed of a federal right.[7]

[7] The denial of the petition of defendant for a rehearing leaves this result undisturbed.

In any event the refusal of the Florida Supreme Court to permit petitioner to interpose the defense it sought clearly denied to it a privilege and immunity under the federal statute. The ultimate judgment is subject to challenge for these reasons:

(1) The judgment stands affirmed against petitioner in a state court when, had the identical issue been tried in a federal forum, the defense interposed would have been available and petitioner would have been accorded the right to establish it by evidence.

(2) The effect of the ultimate decision is to deny to petitioner a right which is established by common law and available under the provisions of the antitrust acts.[8]

*2. A right established by Federal Law is not to be abridged or denied by a serious departure from proper process in a State Court.*

As the case has been argued, it may not be necessary for the Court to consider this question. But a word is demanded because a judgment supported by a carefully reasoned opinion is replaced by a reversal of holding supported only by memoranda opinions. It is the more necessary because in reaching a common result members of the majority seem to have entertained different questions. The result could properly have been reached either by holding:

(1) That, as a matter of law, the defense sought to be interposed was not available in a state court; or

(2) That, in the face of contracts admittedly discriminatory, the undisputed facts disclosed by the pre-trial conference were not sufficient as a matter of law to constitute a defense.

One of the majority of four, seven judges sitting, held that the defense sought was not available in a state court. The other three, in a "per curiam" opinion, held that "The defense sought to be interposed was not available under the

[8] These two arguments are elaborated under Sections 2 and 3 of this title and under title II below.

facts submitted in evidence to the court below."[9] This, it seems clear, must be interpreted to mean that from the undisputed facts disclosed at the pre-trial conference the three judges concluded that as a matter of law the price system of American Can Company and the trade practices attending its operation did not violate the Robinson-Patman Act. Thus, whichever of the two be taken as the ground of judgment, a federal issue is presented.[10]

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[9] The rationale of the summary judgment by the trial court is tersely put by Thomas, J., in the first opinion of the Florida Supreme Court:

> "... the judge must have felt that he should enter a judgment because of a situation where questions of fact had been eliminated and only a question of law remained for his determination. Such a condition obtained so far as the plaintiff's case was concerned, but there is much in the record to indicate that issues of fact were not absent if testimony relative to the pleas were to be considered. In other words, the moment the issues raised by the pleas are contemplated disputed facts appear ... It is evident to us that the trial court thought it proper to enter the judgment pursuant to pre-trial conference on the theory that the facts supporting the declaration were not disputed and that conflicting testimony on the pleas would not preclude such a course inasmuch as the pleas being improper, the evidence relevant to them could be ignored." (R. 600-601).

[10] An analysis of the votes of the Florida Supreme Court is illuminating. In the original judgment, holding the plea valid and remanding the case Thomas, Brown, Chapman, Adams and Sebring, J.J., concurred; Buford, C.J., and Terrell, J., dissented. In the second judgment, affirming "the summary judgment" Terrell, Brown, and Buford, JJ., concurred in the proposition marked (2) above; Sebring, J., supported proposition (1); and Chapman, C.J., Thomas and Adams, J.J., dissented. It is, therefore, evident that the reversal was affected by a change of mind by Brown and Sebring, JJ. The incident is noteworthy because of the mystery which attends the abandonment of a tenable and the taking up of an indefensible position. In the decision after the reargument, four judges out of seven entertained a federal issue and voted to decide a federal question, three holding that as a matter of law the defense sought was available to the petitioner and one that it was not. The other three in their appeal to the record of the pre-trial conference in effect considered a federal issue and voted to decide a federal question; for their votes can be explained only through their insistence that the substantive federal question of the legality of the price system of American Can Company was upon uncontroverted testimony to be resolved in favor of the respondent.

However, if the "per curiam" opinion of the three judges is to be interpreted to mean that the Supreme Court of Florida was weighing conflicting evidence and deciding issues of disputed facts, it does abridge and deny a federal right by a serious departure from legitimate and proper process. The pre-trial conference was set up to clarify, not to resolve, issues in dispute. Furthermore, quite apart from the purpose it was intended to serve, the proceeding lacks all essentials of a fair trial of disputed issues. American Can Company refused in as many as fifty-five instances to produce documents or to permit cross-examination of witnesses. In Appendix C hereto, pp. 58-63, are quoted typical examples which reveal the absence of the essentials of a judicial hearing with respect to a finding on any disputed issue of fact.

If, therefore, the three-judge memorandum be interpreted as deciding any disputed issue of fact, it presents a case in which petitioner has been stripped of a federal right without a proper trial of the disputed issues of fact on which that right is founded.

3. *The Florida Supreme Court has decided a federal question of substantial importance contrary to the decisions of this Court.*

Whatever theory of the judgment is entertained, the record makes it clear that the outcome of this litigation turned upon the answer given to a federal question in the courts of Florida. The Circuit Court of Hillsborough County, Florida, held that the defense of violation of the Robinson-Patman Act was not available in an action in a state court. (R. 580-582).

The opinion runs as follows:

> "As to the defense of illegality of consideration or unlawfulness of the notes under the Federal Statutes, herein above mentioned, I am of the opinion that under decisions of the Supreme Court of the United States such defense cannot be offered in a suit to collect the purchase price of merchandise sold and delivered and affected by the provisions of that act. The act itself prescribes the only remedies available to persons affected by its violation and no other method or relief is to be had. The contract of sale was not under these decisions Malum in se but Malum prohibita only.
>
> "I am, therefore, of the opinion that all questions of fact and law on which the rights of the parties depend are settled in favor of the plaintiff and under Hillsborough County v. Sutton, 8 Southern 2nd, 401, this court should enter judgment in its behalf on the pleadings and facts disclosed by the record in this cause.
>
> "It Is, Therefore, Ordered, Adjudged and Decreed that counsel for the plaintiff is directed to prepare judgment [fol: 749] in favor of the plaintiff in accordance with the findings of this order and upon notice to counsel for defendant to present said judgment to this court for its signature." (R. 582).

On appeal the Supreme Court of Florida, reversing the lower court, held that such a defense was available and that the defendant was entitled to an opportunity to make out its case. Although they arrived at opposite results, the two opinions were alike bottomed upon the decisions of this Court. And whatever be the rationale of the Supreme Court of Florida in its second judgment—whether it held as a matter of law that the defense asked for was not allowable or whether it held that on the evidence taken at the pre-trial conference the trade practices in question did not violate the law—it concerned itself with a federal right, entertained a federal question, and entered a judgment in a realm where the decisions of this Court are authority.

The defense put forward by petitioner would have been available in a cause of action in a federal forum. The right

to such a plea is—as is elaborated below—definitely settled by decisions of this Court.

4. *The sound administration of justice demands of a state court, when called upon to interpret and apply a federal statute, a construction at harmony with that given to it in the federal courts.*

Here a situation is presented which is the converse of that resolved in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188 (1938). That case decided that, when called upon to interpret and apply state law, the federal court should follow the decisions of the highest court of the state in question. In the trial of the present cause, the petitioner put forward as a defense a privilege and an immunity conferred upon it by a federal statute. The rationale of the *Erie* case would seem to demand a disposition of the proposed plea by the Supreme Court of Florida in harmony with that which would be accorded it in the federal courts.

In the situation presented here the need for uniformity stands out the more sharply. The criticism of the *Erie* decision has been that, if the federal court follows the courts of the several states, it will be at the expense of a chance at uniformity the country over. Here it is a nationwide uniformity in the interpretation of a federal law which the rationale of the *Erie* case will serve. Thus the logic of that holding unites with the criticism of it to demand that the state court follow the federal decisions. The rule of harmony sought here can come only from the United States Supreme Court.

## II. In an Action in a State Court to Collect Promissory Notes Given as Consideration for Purchases in Interstate Commerce at Prices Which Through Their Discriminatory Character Tend Substantially to Lessen Competition, It is Proper for the Defendant to Plead That Such Notes are Unenforceable to the Extent That the Transactions on Which They are Based Violate the Robinson-Patman Act.

1. *The plea of restraint of trade as a defense in an action at law is the oldest and best established of the devices for enforcing what we now know as the antitrust laws.*

Although it dates from "time immemorial," the rule against restraints came into the law in the period marked by the breakup of the guilds and as a protest against the exclusive privileges that these "brotherhoods" enjoyed. It was gradually elaborated out of defenses allowed in actions brought at common law. The courts, by harkening to the defendant's plea of restraint of trade, refused to entertain suits against parties who sought their help in creating or maintaining restraints. A writ of trespass was refused to two schoolmasters, who complained that a third had set up a shop in competition.[11] A writ of trespass on the case was refused the Prior of Dunstable against a butcher who, instead of employing my lord's market, sold meat at his own house.[12] In an action for debt—an exact parallel to the instant case—a writ was refused[13] one John Dyer, against a rival who had bound himself by contract not to use "his art of the dyer's craft."[14] And the writ of assumpsit was held not to be available to a person who sought

[11] The Schoolmaster's Case, Y. B. Hen. IV, f. 47, pl. 21 (1416).

[12] The Meat Market Case, Y. B. Hen. VI, f. 19, pl. 13; f. 25, pl. 2 (1433).

[13] The Dyer's Case, Y. B. 2 Hen. V, f. 5, pl. 26 (1415).

[14] Note also, as directly in point, the Blacksmith's Case, 3 Leon. 217, 74 Eng. Rep. 643 (1587).

to hold another party to a restrictive covenant.[15] In fact the "defense sought to be interposed" was not limited to particular causes of action; or the contrary it was available under the whole range of the ancient writs. It was, in fact, out of the acceptance or rejection of causes of action that the common law rule against restraints developed.

In this manner a host of holdings were eventually brought together into the Statute of Monopolies. The prohibitions of this Act are legislative only in a formal sense; it is in essence a garnering of common law holdings into the classic statement of the rule against restraint.[16] It professes to do no more than declare "the ancient and fundamental law." It recites the evils of old by which persons were "hindered, grieved, disturbed or disquieted" in their trades; provides that all suits involving restraint or monopoly shall be "forever hereafter examined, heard, tried and determined" by and according to the common law of the realm and not otherwise. And it goes so far as to provide that as a defense against an accusation of restraint of trade, even the grant of a monopoly by the Crown was not to prevail.[17] Thus, as the common law was elevated above the royal prerogative, the defense of restraint of trade was given a validity as broad as the catalogue of actions at law.

2. *The Sherman Act carries over the common law rules against restraints and makes this body of law applicable in actions concerned with commerce among the several states.*

For lack of space, no more than a shorthand account of how the common law against restraints was converted into a federal statute can be recited here.[18] After some months

[15] An Anonymous Case, Moore 115; 72 Eng. Rep. 477 (1578).

[16] 21 Jac. 1, ch. 3 (1623-24).

[17] The royal grants which were to be recognized by the courts were specified in the Statute itself.

[18] The steps in the conversion of common law rules into the federal statute can be followed in the debates of the Fifty-first Congress on the Sherman Bill as recorded in THE CONGRESSIONAL RECORD. A short account is to be found in Temporary National Economic Committee, Monograph No. 16, "Antitrust in Action," Sec. 1, Subsec. 2.

of hectic debate, "the Sherman bill," originally aimed at abating the trusts, had been amended into an omnibus sort of measure pleasing to no one. As the summer recess became imminent, the Senate, in a last desperate move, referred the bill, not to the Finance Committee whence it had come but to the Judiciary Committee. In less than a week this Committee returned to the Senate a very different bill. It had stripped from the measure sent to it all the provisions of substantive law and in their stead had recited the common law rules against restraint. The terms of the common law seemed more comprehensive, flexible, and adaptable to the changing circumstances of life than the more concrete definition of wrongs which Congress had tried vainly to phrase. The formal recitation seemed to the Committee—and to the Congress—to be necessary, for at the time it was a matter of general belief that there was no common law of the United States, and that a statute was necessary to put the ancient rules within reach of the federal courts.

The real novelty was to fit out the ancient law with additional remedies. Nothing was set down to deny, impair or abridge the techniques of enforcement which had always been inseparable from the rules themselves. As yet the administrative process had won little foothold in national or state government; it was, in a day when laissez-faire was still dominant, the thought to make the statutes in respect to trade and commerce self-enforcing and so far as possible to keep the government out of business. So, a remedy was lifted bodily out of the Statute of Monopolies; and, as a supplement to the plea of restraint as a defence, the person injured by a restrictive conspiracy or covenant, was encouraged to bring offenses to the attention of the courts by a promise of three times his damage and costs, if he made out his case. The Congress was in earnest; and, in addition to reliance upon private litigation, it sanctioned resort to official action. To that end it provided the government with access to equity, sanctioned a libel on the goods

shipped in violation of the act, and elevated the offense of restraint of trade into the category of crime. As at common law, so under federal statute, no court was permitted to entertain any suit which would treat as lawful any transaction which was in restraint of trade.[19]

3. *The Robinson-Patman Act specifies and spells out in detail the restraint of trade forbidden alike at common law and under the Sherman Act:*

The Sherman, the Clayton, and the Robinson-Patman Acts are alike in kind, in intent, in the actions they outlaw. The three, with some minor measures, are commonly referred to as "the antitrust acts." In legislative language the Clayton is set down as a "supplement to" the Sherman Act, and the Robinson-Patman Act as an "amendment to" the Clayton Act. The purpose of all the acts is to outlaw various forms of conduct which impose, or threaten to impose, on the national economy departures from the competitive pattern. Thus the Sherman Act, employing the language of the common law, is directed against restraint of trade; the Clayton and the Robinson-Patman Acts, substituting a more modern idiom, are concerned to outlaw particular practices the effect of which is "substantially to lessen competition." The anti price-discrimination provisions of the last mentioned Act do no more than enumerate an item clearly comprehended within the blanket condemnation of the Sherman Act.

In all of this the law of antitrust has taken its natural course. It is no cause for surprise that the legal creation of petty trade has been elaborated to meet the conditions of

[19] The courts have quite consistently upheld the availability of the plea of restraint of trade under the Sherman Act. *Bement & Sons* v. *National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058, (1902); *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486, (1909); *Pratt* v. *Paris Gaslight and Coke Co.*, 168 U. S. 255, 18 Sup. Ct. 62, 42 L. Ed. 458, (1897); *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 63 Sup. Ct. 172, 87 L. Ed. 165, (1942).

modern industry. It is quite obvious that price discrimination should have been singled out for legislative specification; for, in the margin between price and cost resides the business man's chance at survival; and any act of a seller of a producer's goods which disturbs equality of cost gives an unearned advantage to a favored party. This power of the dominant corporation to substitute a dual, or even a multiple, for a single price, has for decades been regarded by the Congress as one of the greatest sources of monopoly and of the concentration of economic power. For that reason it was, as early as 1914, by the Clayton Act singled out for special attention. And in 1936 the Robinson-Patman Act gave an even stricter mandate against a price-structure which through its discriminations disturbed the operation of our system of free enterprise.

It is, of course, true that the Robinson-Patman Act put new sanctions behind antitrust enforcement. But, as the novel remedies with which the Sherman Act was fitted out did not take away the pleas in defense which were the gift of the common law, the novel remedies of the Robinson-Patman Act did not deny or abridge the defenses available to the injured party before its passage. By the time of the passage of the Clayton and the Robinson-Patman Act, the way of administration had reason and experience behind it. A proof which would be easy under petty trade, where the facts were local and well-known, would be difficult in respect to a large corporation operating on a national scale. A suit which a small business man could maintain against a neighbor tradesman might impose an impossible burden if the adverse party was a far-flung corporate entity. If then the Congress called the government to the protection of the little fellow, its interest is not to be interpreted as taking from him the legal weapons with which he had been encouraged to put up his own fight. If the Congress had intended to take from the injured party an

ancient remedy, the Congress would doubtless have said so.[20]

Thus the whole history of antitrust legislation reveals a clear intent by the Congress always to strengthen, never to weaken, the prohibition against restraint; to throw additional defenses around the competitive system, not to strip from the small business man the resort to self-defense, when sued in court, which has been its right from time immemorial.[21]

The history of antitrust shows the Robinson-Patman Act to be an integral part thereof.[22] All through the years the Congress has been sensitive to the effects of the concentra-

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[20] In fact in the Clayton Act itself—see Section 16—the Congress did take from the shipper the right to an action at law in respect to an "unfair" railroad rate and did specifically limit legal challenge to the United States Government. In its stead the shipper was given the right of complaint to the Interstate Commerce Commission. The reason for the Congressional denial of the private cause of action was that resort to the courts by every individual who felt aggrieved carried a serious hazard to the administrative process. In this particular instance exceptional reasons demanded a departure from established practice; and the abridgement of an ancient right was made explicit by the legislature itself. The very writing into the statute of the exception is an acknowledgment that in other cases it stands.

[21] A decision of this Court has allowed the defense of restraint of trade to be interposed in a suit for an infringement of a patent. In that case the conduct prompting the initial legal action, belonging rather to tort than to contract, did not emerge in the course of a transaction between the parties. *Mercoid Corporation* v. *Mid-Continent Investment Co.*, 320 U. S. 661, 64 Sup. Ct. 268, 88 L. Ed. 376, (1944); *Mercoid Corporation* v. *Minneapolis-Honeywell Regulator Co.*, 320 U. S. 680, 64 Sup. Ct. 278, 88 L. Ed. 396 (1944).

[22] In the actions in the courts below American Can Company insisted that the defense sought was not available under the Robinson-Patman Act. There it granted, at least obliquely, that the defense was allowable at common law and admitted the possibility of its being available under the Sherman Act. But, it urged that differences between the Sherman and the Robinson-Patman Acts put the defense outside the reach of the defendant. It cannot be determined from the ultimate judgment whether this distinction was eventually accepted or rejected by the court below.

tion of economic wealth and power; all through the years the Congress has been solicitous lest conditions of survival be made intolerable for "the little fellow." Nothing along the way indicates an intent on its part to regard any of the new remedies it has created as a substitute for the right of a person to plead restraint of trade as a defense. To argue that its acts have closed to the victim of monopolistic practice the one practical and immediate avenue of redress—the right to a defense in his own local court when sued—is to pervert the intent of Congress.

4. *To deny the defense sought is to take from the victim of price-discrimination his most effective—often his only practical—remedy.*

In the absence of the defense sought, the small merchant or manufacturer is left without an immediate and practical remedy. The only direct move which he can make is to institute a new suit for triple damages in a federal court. The only other recourse is to file a complaint with the Department of Justice or with the Federal Trade Commission. In due course there may—or may not—emerge a criminal action, a suit in equity, or a cease and desist order seeking to end the abuses from which he suffers. A word about each of these alternative remedies is enough to show its inadequacy as an instrument of personal justice.

A. *The Suit for Triple Damages.*—At the time of the passage of the Sherman Act, the general belief was that the antitrust laws should be as nearly self-enforcing as possible. But the general reliance then put upon the suit for triple damages has not been vindicated by experience. Even if restraint can be shown,[28] the hazard of a proof of damages remains to be met. The conditions which impel a business enterprise towards growth or decay are many and various; to determine the exact place of the restraint in question among these, and to reduce to pecuniary terms the harm of

[28] Temporary National Economic Committee, Monograph No. 16, "Antitrust in Action," Sec. 2, Subsec. 6.

which it is the cause, imposes on a court an almost impossible task.[24] There is, in fact, little chance for a small business concern to win such a suit against a large corporation, unless the federal government has blazed the way with an action of its own.[25]

B. *The Criminal Action.*—Nor is a criminal action, instituted by the federal government, a remedy upon which a party in the situation of your petitioner can rely. The small concern can file a complaint with the Department of Justice. It has access to no process by which to compel the government to move; and, for any one of a number of reasons, the government may delay action or may never get around to the case. But, if it acts promptly and vigorously, the Department of Justice can not secure to the small business the relief it seeks. It is only as a deterrent that the criminal action is effective; and that does not operate to undo harm done in the past. Even as a future deterrent its efficacy is seriously impaired. For the profits which result from modern forms of restraint, such as price discrimination, are so huge and the penalties for violation of the antitrust laws so small that corporations such as American Can Company can afford to take chances.

C. *The Suit in Equity.*—The government's suit in equity is not shaped to the needs of the party in the situation of

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[24] *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 51 Sup. Ct. 248, 75 L. Ed. 544 (1931).

[25] Note that Congress has recognized these difficulties in Section 5 of the Clayton Act, Section 16, Title 15, U. S. C. A.:

"A final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, This section shall not apply to consent judgments or decrees entered before any testimony has been taken."

petitioner. The complaint of the injured person does not institute it; it does no more than inform the Department of Justice. At best the suit, if won, can do no more than enjoin the continuation of illegal practices; it can not be made to reimburse the party wronged for the excess in price already exacted. Nor can it be made to compensate for the weakening of competitive position which unlawful charges have imposed.

D. *The Cease and Desist Order.*—Almost the same statement is to be made about the cease and desist order. It is not a writ to which, as a matter of right, a party injured by unlawful discrimination has a right. The process leading to its grant is instituted by the Federal Trade Commission; the injured person can do no more than file a complaint. Like the decree in equity, it is preventive of future wrongdoing rather than compensatory of harm already suffered. Its prohibitions may often be circumvented by ingenious revision of the trade practices outlawed. However stern its language, its mandate is in practice no stronger than the system of police with which it is followed up.

There is, therefore, available to the victim of a system of price discrimination only one effective remedy—the defense put forward in this case. If that remedy is held to be within his reach, he is in a position to fight his own legal battle. He may refuse to pay for the goods so long as the price made to him remains unlawful. The small processor, in the position of Bruce's Juices, Inc., is dependent upon the large corporation, such as American Can Company, for a raw material without access to which he can not carry on his business. The deal is to him not a matter of choice, but of compulsion; to break the tie is to invite himself to fold up. The relationship is a corporate feudal tie.

The state court, by its denial of the remedy sought, in effect interposes its veto to the enforcement of federal laws; confers a sanction upon transactions which federal law pro-

hibits; and aids and abets conduct which federal law holds to be a crime.

**III. The Pleas—As Clarified and Supported by the Unfinished Pre-Trial Conference—Are Sufficient to Require the Lower Court to Submit the Issues of Price Discrimination to Trial on Their Merits.**

1. *The allegations in the pleas are sufficient to demand that the issues raised be submitted to trial.*

The question of price discrimination, as presented here, may be resolved into three closely connected issues:

(a) Was the system of prices, with its schedules of discounts, as operated by American Can Company a true system of quantity discount, legally grounded upon differences in cost, or was it a system for the classification of customers by size which it was the very purpose of the Robinson-Patman Act to outlaw?

(b) Did price discrimination, other than the so-called "quantity discount," attend the operation of American Can Company's price system?

(c) Apart from favoritism in respect to price, were other forms of discrimination practiced by the American Can Company? The system of quoted prices may itself be violative of the Act; or practices which attend purchase and sales may violate the Act by turning quoted prices into fictions.

To explore the sufficiency of the allegations, the pleas of petitioner set forth, with due circumstance and detail, the following types of unlawful discrimination:

(a) That American Can Company engaged in direct discrimination in that the prices charged petitioner were higher than those made to its larger competitors. (R. 4-5).

(b) That American Can Company furnished to certain customers equipment, for the closing of cans without cost while it charged the petitioner therefor in violation of paragraph (e) of Section 13 of the Act. (R. 5).

(c) That discounts of 5 per cent were allowed to the California Packing Corporation and to Stokely Brothers and Company, Inc., both of which have branch plants in Tampa where petitioner's plant is located; and that to petitioner was refused the same—or in fact any discount—on purchases in similar amounts. (R. 6).

(d) That American Can Company illegally favored a number of petitioner's larger competitors—among them the California Packing Corporation; Stokely Brothers and Company, Inc.; the Hawaiian Pineapple Company; Libby, McNeil and Libby, Inc.; and the Great Atlantic and Pacific Tea Company—by allowing to each of them, and denying to petitioner, discriminatory discounts of from 3 per cent to 5 per cent on all purchases. (R. 6-7).

(e) That from its factory at Tampa, Florida, the American Can Company delivered cans without cost to the plants of the California Packing Corporation and of Stokely Brothers and Company, Inc., while petitioner was required to pay all delivery charges. (R. 6-7).

(f) That the American Can Company sold cans in Texas at prices lower than those exacted in Florida in violation of Section 13a of said Act. (R. 7).

These pleas set forth in detail facts which, if true, show beyond question the violation of various sections of the Robinson-Patman Act.

2. *The testimony taken at the unfinished pre-trial conference, instituted for the sole purpose of exploring and clarifying the issues to be tried, discloses no undisputed facts or admissions by petitioner which would justify a summary judgment in the absence of trial.*

In response to the defense put forward, counsel for American Can Company sought, through a series of motions, to attach compulsory amendments to petitioner's pleas, alleging a great many additional facts. At this point the trial judge discovered that—with the initial question,

the federal issue raised, and the amendments proposed to the defendant's pleas—the case was becoming unusually complicated. Accordingly, on his own motion, he ordered a pre-trial conference. (R. 37-39, 57-59). Its purpose was "to simplify the issues . . ., to determine the necessity or desirability of amending the pleadings, to obtain admissions of fact and of documents which will avoid unnecessary proof, and to limit the number of witnesses." The order further provided "that either party . . . is authorized and empowered to take necessary depositions. . ." Objections to proposed interrogatories were to be ruled on by the court before any witness was required to answer. (R. 37-39).

At this pre-trial conference the facts disclosed by the evidence—so far as it was taken—failed to show any admission by petitioner which would justify a summary judgment against it. Instead, the evidence introduced, incomplete as it was, established a prima facie case in respect to many of the discriminations complained of. (R. 65-83, 571-579).

The officials of the American Can Company admitted a lack of uniformity in respect to the equalization of freight charges between competitive points. (R. 148). They admitted that freight deductions were sometimes allowed for other reasons which they were able to determine, (R. 149); that the profits of "equalization" and even of "special rates" were given to special customers and withheld from others; that such favors continued during the life of the contract with the particular purchaser (R. 172-173); that usually such concessions were made orally, though once in a while confirmed by letter. (R. 173). A request was made by petitioner for the production of letters revealing the favored customers; the witness was instructed by counsel not to answer; the question was certified to the trial court. (R. 173-174). It was also admitted that substantial discounts were allowed solely on the basis of aggregate quantity sales. (R. 367-368).

*3. If there was jurisdiction to render a summary judgment, the rule of the Robinson-Patman Act in respect to burden of proof would compel judgment on the record in behalf of the defendant.*

In respect to the claims of unlawful discrimination the record presents substantial issues of fact which must be submitted to trial. However, the record in the instant case on its very face discloses a record which illegally discriminates against the small customers of American Can Company and to the advantage of their larger competitors.

The testimony of the general counsel of American Can Company which, it is submitted, is conclusive on this point, is presented in Appendix D to this brief. (R. 571-579). In its revealing detail it constitutes a succinct disclosure of the unlawful character of the prevailing price system. Other testimony to the same effect is found in R. 209-219, 234-245, 506-507.

At the outset it is admitted that the burden of proving that the difference in price charged to Bruce's Juices, Inc., and to its large competitors must be justified by a showing of difference between them with respect to cost. In assuming that burden, the general counsel testified that at the time it was passed in 1936, its price system was illegal under the Robinson-Patman Act. To remedy this situation the company abandoned its device of quantity discount and substituted therefor a system of classifying purchasers into the three classes of "the largest customers, the middle-sized ones, and the smaller ones." (R. 572-573). All customers whose purchases run to less than $500,000.00 a year receive no discount; those whose purchases are between $500,000.00 and $7,000,000.00 receive from ½ per cent to 4 per cent discount; those whose purchases amount to or exceed $7,000,000.00 receive a 5 per cent discount. As a result expenses are not apportioned by customer or even by plant; they are hypothecated for the class of customer. (R. 241). For example, against the small purchasers is set down an item of expense for "commissions," although it is admitted that in Florida no commissions were required to be paid. (R.

510, 576). Such a classification is the very type of offense at which the anti price-discrimination provisions of the Robinson-Patman Act was aimed. He admitted that such differences in price were not to be justified by differences in the cost of manufacture. Accordingly in the search for a rationale by which to make legal this system of classifying customers, it resorted to differences in selling costs. And since, as he admitted (R. 572-574), the company lacked adequate empirical data, it fell back, as a substitute, upon a system of cost accountancy which, as the paragraphs below will reveal,[25a] rested upon no more secure foundation than hypothesis.[26]

This method of proving cost had the merit of simplicity. It disregarded the actual expense of serving individual pur-

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[25a] A comprehensive discussion of the kind of mercantile practices which are at issue here is to be found in a collection of articles bearing the title of "Price Discrimination and Price Cutting" which make up the number of *Law and Contemporary Problems* for June, 1937.

[26] A pertinent, in fact the classic example, of the maze into which the argument is driven when a legal judgment is made to turn upon the intricacies of cost accounting is presented in Federal Trade Commission Docket No. 2116, *In the Matter of the Goodyear Tire and Rubber Co.* In respect to the justification of prices made by Goodyear to Sears Roebuck & Co. which was lower than that made to dealers who handled the tire which bore the Goodyear name, the whole accountancy system of Goodyear was subjected to administrative scrutiny. Needless to say there was in respect to every single item of expense a wide diversity of views between the experts representing Goodyear and the Commission. The elusive character of such a proceeding was one of the chief arguments for the rule in respect to the burden of proof instituted by the Robinson-Patman Act.

A kindred example of the treacherous use of cost accountancy as a basis for legal distinction is presented by the public utility cases. As Mr. Justice Black, dissenting, cogently remarked in *McCart v. Indianapolis Water Co.*, 302 U. S. 419, 428-429, 58 Sup. Ct. 334, 338, 82 L. Ed. 336, 343, (1938):

> "Wherever the question of utility valuation arises today, it is exceedingly difficult to discern the truth through the maze of formulas and the jungle of metaphysical concepts sometimes conceived, and often fostered, by the ingenuity of those

chasers of cans. The time spent by salesmen on each customer was lumped for the class as a whole and then distributed pro rata. (Appendix D, p. 65-66). Following the same principle, commissions which were paid to some customers and not paid to others were pro rated as charges against all the customers of the class. (Appendix D, pp. 68-69).

Thus, by the simple device of disregarding the actual cost of particular transactions and charging small Customer A with expense caused to American Can Company by small Customer B, American Can Company proved that the cost of serving all small customers was greater than the cost of serving large ones. As a result it claims the right to make a discrimination in price between Bruce's Juices, Inc., and its larger competitors without reference to the actual difference in the expense of sale.

In this way a system of price discrimination is admittedly set up and frozen against change. Such a system has no relation to actual cost. Under its unbending strictures it is impossible for a small customer to escape his discriminatory classification into which he has been put by increased efficiency. Large corporate buyers may lump the purchases of their widely-scattered subsidiaries in order to gain the advantage of a discount. Smaller customers are not permitted to form a cooperative buying organization to secure a like competitive advantage for themselves. (Appendix D, p. 68). No customer is permitted to improve his discount position by actually reducing the expense incurred by the

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who seek inflated valuations to support excessive rates. Even the testimony of engineers, with wide experience in developing this theory and expounding it to the courts, is not in agreement as to the meaning of the vague and uncertain terms created to add invisible and intangible values to actual physical property. Completely lost in the confusion of language—too frequently invented for the purpose of confusing—commissions and courts passing upon rates for public utilities are driven to listen to conjectures, speculations, estimates, and guesses, all under the name of 'Reproduction costs.'"

American Can Company in serving him. (Appendix D, p. 69). This is the system put forward by American Can Company to sustain the burden of justifying the difference in price to small and large buyers. It seems obvious that such a system of classification violates the very purpose of the proviso permitting a difference in prices based on cost of serving. As pointed out by Senator Logan, a sponsor of the bill on the floor of the Senate, no merchant was to be deprived of the advantages which his superior efficiency gave him.[27] Yet the system of American Can Company puts an efficient small merchant under a permanent disadvantage by allocating to him the costs of inefficient concerns whose purchases are of the same size.

This system of the classification of customers should have been revealed at the pre-trial conference in the detail of its colorful operation. Yet, while admitting the burden of proof was upon American Can Company, to show justification, the corporation refused to permit its witnesses to be cross examined with respect to the amounts received by way of discount by the larger competitors of petitioner. It also refused to permit examination of its books with respect to the amount of discounts actually paid. This refusal amounts to total failure with respect to sustaining the burden of proof imposed by law upon American Can Company.

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[27] Senate Journal for April 28, 1936, 6281. Mr. Logan: "I will say very frankly to my colleague that there is no way by legislation to afford protection to the less fortunate or less efficient merchant under a condition such as that.

"We may go as far as we can to protect him, but if there be one merchant who is efficient, who saves by discounting his bills, and desires to use that saving by passing it on to the public, the man who cannot secure such advantages is apt to go under sooner or later, and we cannot help him by law.

"This bill attempts to bring about fair treatment among those who are in the same condition. We cannot prevent efficiency; we cannot stop progress. Those who are efficient, those who are good businessmen, those who are skillful in their business are not restrained in any way. That is true even of the large seller and of the manufacturer."

The ground for the refusal of this vital information was that the amounts of discounts to larger competitors were confidential. In the light of the company's past record in respect to price discrimination, this reason seems frivolous.[28]

Other typical instances of the refusal of American Can Company to disclose essential information is presented in Appendix C, pp. 58-63.

It is submitted that this price system on its face violates the prohibition of the Robinson-Patman Act. Repeatedly it has been so held by the Federal Trade Commission. *Simmons Company*, Docket No. 3840; *Master Lock Company*, Docket No. 3386; *H. C. Brill Co., Inc.*, Docket No. 3299; *American Optical Company*, Docket No. 3232; *John B. Stetson Company*, Docket No. 5172.

When a prima facie case of discrimination is shown, the accused corporation must, by a showing of lower cost with volume of sales, demonstrate that the quantity discount falls within the exception permitted by law. *American Can Co.* v. *Ladoga Canning Co.*, 44 F. (2d) 763 (C. C. A. 7th) 1930.

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[28] For example, in the case of *American Can Co.* v. *Ladoga Canning Co.*, 44 F. (2d) 763 (C. C. A. 7th), certiorari denied 282 U. S. 899, 51 Sup. Ct. 183, 75 L. Ed. 792 (1930), we find the following in the Court's opinion:

> "Defendant made two contracts with Van Camp on the same day, one a secret agreement which contained provisions for rebates and allowances not found in the simultaneously executed agreement on the same subject. Defendant told plaintiff and all other purchasers, save Van Camp, that its prices were the same to all, and it did not permit its own sales force to know of the secret agreement with Van Camp. From these findings the jury could have readily found that defendant did not in good faith cut its price to Van Camp because of the latter's volume of business.
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> "Defendant's argument that it feared a rival might take away the Van Camp business and, therefore, the discrimination was justifiable because made in good faith to meet competition, is not supported by persuasive testimony. Likewise, its asserted fear that Van Camp might go into the tin can producing business could well have been rejected by the jury as its reason for the favoritism shown Van Camp. While a

See also *Swift & Co.* v. *Wallace*, 105 F. (2d) 848 (C. C. A. 7th) 1939; *Oliver Bros., Inc.* v. *Federal Trade Comm.*, 102 F. (2d) 763 (C. C. A. 4th) 1939; *Hansen Packing Co.* v. *Armour & Co.*, 16 F. Supp. 748 (S. D. N. Y.) 1936.

Moreover, the system of classification of customers by aggregate volume of seriatim purchases in issue here is a discrimination analogous to "the basing point pricing system" held unlawful alike by the Federal Trade Commission and by this Court. *Federal Trade Commission* v. *A. E. Staley Manufacturing Co.*, 324 U. S. 746, 65 Sup. Ct. 971, 89 L. Ed. 989 (1945); *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726, 65 Sup. Ct. 961, 89 L. Ed. 977 (1945).

We submit that if the record at the preliminary hearing be considered as a trial, the burden of proof put by the Statute on the American Can Company has not been met. Certainly it is not met by a cost accounting system made-to-order, whose very purpose is to provide a justification for

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jury might perhaps have found for defendant on both of these issues, the evidence was such as to call for their submission to a jury.

"We fully agree with defendant's counsel when they say that the executive officers of the manufacturing company and not a jury must decide whether the producer shall or shall not make price concessions to large consumers whose large demands make output more constant and thus lessen costs.

"But the right of defendant's officers to determine the necessity of granting price reductions to a large customer is one thing. The right (and the duty under the statute) to inquire whether a price reduction was in fact made because of volume of business or to meet competition presents an entirely different issue. . . .

*Cf. A. W. Feeser, Inc.* v. *American Can Co.*, 2 F. Supp. 561 (D. C., D. Md.), 1932; *C. F. Simonin's Sons, Inc.* v. *American Can Co.*, 22 F. Supp. 784 (E. D. Pa.), 1938, 24 F. Supp. 765 (E. D. Pa.), 1938, 26 F. Supp. 420 (E. D. Pa.), 1939, 30 F. Supp 901 (E. D. Pa.), 1939, 1 FRD 134 (E. D. Pa.), 1939; *Gibson Canning Co.* v. *American Can Co.*, 1 F. Supp. 242 (E. D. Ill.), 1932; *George Van Camp & Sons Co.* v. *American Can Co., et al.*, 278 U. S. 245, 49 Sup. Ct. 112, 73 L. Ed. 311, 60 A. L. R. 1060, 30 F. (2d) 1011 (C. C. A. 7th), 1929.

its own system of price discrimination.[29] Even more certainly the burden of proof is not met when American Can Company refuses to disclose the detailed information on which its cost accounting system is based.

The rationale of the burden of proof in this type of case has been succinctly put in a comment entitled "The Robinson-Patman Act in Action," in 46 Yale Law Journal 447, 482.

> "To reduce the possibility of validating discounts through this Section, however, the burden of justifying the price variation is placed on the accused. It seems almost impossible to use the arbitrary premises and conflicting techniques of cost accounting to prove that a seller has realized economies in any particular sale. At best the issue can be framed only in terms of the predictable. Thus, a judge finds that a quantity discount might reasonably be expected in the long run to effect economies in the cost of production. But under Section 1 of the Act, the accused must 'affirmatively' show that a particular price differential is based upon a definite and certain calculation of cost savings effected in the sale under scrutiny. And because the Act makes no allowance for the predictable, the issue may often be determined against the party upon whom the burden of proof falls."

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[29] "Cost accounting procedure rests upon over-simplified and largely arbitrary fundamental analyses. In assessing the value of cost accounting service the cost accountants' own estimates of the utility of the unit costs which they find must not be taken too seriously. An examination of the procedures, reduced to formulae, whereby the unit costs are found, shows in many systems that the figures produced cannot possibly have the properties attributed to them; in many instances, indeed, it is incorrect to call them costs at all."—"Cost Accounting," by John B. Canning, Encyclopaedia of the Social Sciences, Vol. IV, pp. 475-478 (1931).

## IV. The Holding of the Florida Supreme Court, if Allowed to Stand, Would Impair the Enforcement of the Robinson-Patman Act; Seriously Weaken the Competitive Position of Small Business; and Promote a Concentration of Economic Wealth and Power in Contravention of Public Policy as Manifest in the Antitrust Laws.

The answer to the question posed by this suit is of importance in its effects upon litigation, the conduct of business, the pattern of the economy, the general welfare. It has been shown that the Robinson-Patman Act is a spelling out in some detail of the prohibition against restraint of trade. It follows, as of course, that a defense, which according to the decisions of this Court, is available when the offense is against the common law or the Sherman Act is also available when the offense is against the Robinson-Patman Act. The issue presented here may emerge in a case in any state in the Union; and the administration of justice demands that state courts the country over should be able to rule correctly upon the availability of the defense sought here.

The importance of this question transcends the interest of petitioner. If the victim of a flagrant violation of the Robinson-Patman Act, denied the opportunity to enter such a defense when sued, must in another action go into the federal courts to assert his right, the practical effect is to defeat to a large degree the purpose that Statute is intended to serve. The economic consequences of such a holding are serious. For then the only remedy which lies within the means, as well as the legal reach, of the small concern—that of a defense in his local court—is lost. As a result there will be taken from him a plea of restraint which since time immemorial has been among the ancient rights of the litigant. The results are of general concern; they should not—they cannot— be measured in terms of injustice done in the individual case.

To approve—and thus to convert into the law of the land—the judgment of the Florida Supreme Court is to enthrone a nationwide system of discriminatory trade practices. It is for this Court categorically to say whether the purpose of the Congress in outlawing discriminatory practices is to be compromised or even thwarted by a judicial denial of age-old pleas which are instruments of its realization. For a denial of the defense asked for involves the most serious consequences.

(1) The loss of a remedy, perhaps the most effective remedy, will rob the Robinson-Patman Act of much of its power of prevention. The victims of price discrimination will be denied the opportunity to defend themselves when in ordinary suits at law the transactions out of which such unlawful conduct emerges are already in court and the defense is most easy and certain. The vigilance of the wronged in the defense of their own right, upon which, among other sanctions, the enforcement of the antitrust laws has been rested, will be seriously impaired. And, since administrative action is uncertain and the triple damage suit too expensive for everyday use, the risks which attend violation will be materially reduced.

(2) As a consequence all small business will be put in jeopardy. The seller, who maintains a multiple price structure, will bring his suits in state courts, where the buyer can not fight back by pleading the discriminatory practices to which he has been subjected. The victim, however great the handicap imposed on him, can assert his rights only by instituting a new suit for triple damages in a federal court or by waiting for the federal government to come to his rescue. The triple damage suit is likely to prove protracted and expensive; damages caused by a disadvantageous competitive position are so speculative as to be usually unprovable. Nor can the buyer rely for protection upon the action of the government. The Department of Justice or the Federal Trade Commission may never get around to the matter. The suit in equity or the cease and desist order operates in respect to the future and does not afford him a remedy for

wrongs endured in the past. And, so long as he lacks his own remedy, lower prices, quantity discounts, special services, benefits of one sort or another denied to him will be available to his stronger competitor. At best, the small merchant can compete only under serious handicaps; at worst he is forced into bankruptcy.

(3) If this ruling is allowed to stand, a curious result will follow. Instead of the violator revising his system of trade practices to accord with the law, the injured party must adjust its affairs to trade practices which violate it. The victim will be compelled to seek an escape from the squeeze between cost and price which the seller, from which it must purchase, has the power to impose. If it is to secure the lower prices and the special favors essential to survival, it may be driven to become a subsidiary of its larger competitor. Or a number of smaller concerns may be forced to form a combination in order to secure treatment equivalent to that accorded "the most favored customer." In either event the move will be towards the result which it is the very purpose of the Robinson-Patman Act to forestall.

## CONCLUSION.

It follows that from any possible interpretation of the opinion of the Supreme Court of Florida your petitioner has been denied a federal right. The clarification of the limits of the federal right is of far-reaching public and economic importance. If a manufacturer, instead of establishing quantity discounts upon differences in costs, is permitted to allocate expenses in such a way as to justify an arbitrary classification of customers, the intent of the Robinson-Patman Act is perverted. If the defense sought in this action is not available to independent business concerns which are victims of discriminatory trade practices, the competitive position of industry the nation over will be seriously impaired and public policy as manifest in a federal statute will be defeated.

Your petitioner, therefore, prays this honorable Court that it remand the case to the Circuit Court of Hillsborough County, Florida, with the ruling that the plea of a violation of the price-discrimination sections of the Robinson-Patman Act by the plaintiff is a proper and legal defense in an action brought in a state court, and with the direction that the defendant be accorded his federal right to make good such a plea by trial at law.

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# APPENDIX A.

## Opinions of the Supreme Court of Florida.

[R. 593-601.]

IN THE SUPREME COURT OF FLORIDA,
JUNE TERM, 1944.

EN BANC

HILLSBOROUGH COUNTY.

BRUCE'S JUICES, INC., *Appellant*,

v.

AMERICAN CAN COMPANY, *Appellee*.

An Appeal from the Circuit Court for Hillsborough County,
L. L. Parks, Judge.

Cody Fowler and Shackleford, Farrior & Shannon, for Appellant.

John M. Allison, Harry B. Terrell and Whitaker, Whitaker & Terrell, for Appellee.

OPINION—Filed October 20, 1944.

THOMAS, J.:

An action on promissory notes culminated in a judgment for the plaintiff, and the defendant appealed.

Inasmuch as no question presented here for determination requires an analysis of the declaration, we shall proceed immediately to give a condensation of the pleas which appear to have given rise to the questions, four in number, which we must decide.

The first plea set out that notes were given for cans purchased from the payee by the maker and that the transaction was unlawful because the former "while engaged in commerce among the several states, directly and indirectly discriminated in price between different purchasers of * * * cans of like grade and quality, * * * sold for use and resale within the United States * * *" the effect of which "was

substantially to lessen competition or tend to create a monopoly * * * and to injure, destroy and prevent competition with certain customers of * * * Defendant in violation of paragraph (a) of Section 13 of Title 15, United States Code * * * ."

The second plea contained the allegations that the discrimination was "in favor of certain purchasers of * * * cans, and against the Defendant, a competitor of such purchasers, which cans were bought for resale in interstate commerce by furnishing to such purchasers * * * equipment for the closing of cans * * * without cost or charge * * * while charging rent for said equipment furnished to the Defendant, in violation of paragraph (e)" of the same section and title of the code.

In the third plea it was averred that there was discrimination by the allowance of discounts "to * * * purchasers over and above any discounts * * * available at the time * * * to * * * the Defendant and others similarly situated in respect of the sale of * * * cans, of like grade, quality and quantity, in violation of Section 13a" of the same title of the code. This plea is amplified by the statements that two companies in the same business of canning juices in Tampa and selling their products throughout the country as competitors of defendant were allowed a "large and discriminatory discount (5 percent)" not available to it and were relieved of delivery charges which defendant was required to pay; that three other companies selling products in competition, but evidently not canning in the state, were likewise favored.

In the fourth plea it was charged that plaintiff sold cans in Texas for less than in Florida in violation of Section 13a, supra.

The appellant has observed in the brief that we need not, in our consideration of the controversy, make "any reference to the voluminous testimony set forth in the record inasmuch as the Trial Court took the position * * * the defense of illegality * * * was not available" and "correctly stated the gist of the defenses" as the illegality and unenforceability of the notes "because the transaction in which they were executed (was) unlawful because plaintiff violated the Robinson-Patman Act, U. S. C. A., Title 15, Section 13." The court concluded that the defense could not be presented for the reason that the federal statutes prescribe the only available remedy, and transactions in viola-

tion of these laws are not "Malum in se but Malum prohibita only."

The initial question challenges the ruling of the circuit judge that any remedy secured to the defendant by "the Sherman Anti-Trust Law as amended by the Clayton Act and as amended by the Robinson-Patman Act" could not be employed as a defense to a suit in the state court on the notes, but could only be asserted in an action for affirmative relief in a federal tribunal. In the second, third, and fourth questions, respectively, appellant asked: "Where the consideration of notes is dependent upon a transaction which is illegal, may recovery nevertheless be had * * * upon the theory that the notes constitute a distinct contract based upon a valid consideration?" and "Is a contract which is founded on a violation of a penal statute void even though it is not expressly declared void by the statute?" and "Was it necessary that the evil intended to be prohibited by the anti-trust statute be malum in se in order to render the contract; which was in direct contravention of the act, void and unenforceable?"

It should be pointed out here that there is an apparent discrepancy between the first question and the pleas we have digested, for the former relates to three acts of the Congress, i.e., the Sherman Anti-Trust Law and the Clayton and Robinson-Patman Acts, but the latter refers only to Section 13a and paragraphs (a) and (e) of Section 18, Title 15, U. S. C. A. As we understand it, the laws cited in the pleas are parts of the Clayton Act as amended by the Robinson-Patman Act, and not parts of the Sherman Anti-Trust Law.

Bearing in mind the observation of the trial judge, conceded by appellant to be accurate, concerning the nature of the defenses, the statement of the appellant about the needlessness of any reference to the testimony, and the character of the questions posed, we conclude that the questions we must decide are actually two, i.e., whether (1) remedies furnished by the Clayton and Robinson-Patman Acts may become defenses in a suit on promissory notes to cover the purchase price of articles alleged in the pleas to have been sold in violation of those laws, and (2) the sale and the notes constituted separate transactions. We shall confine our discussion accordingly.

To avoid confusion we wish expressly to repeat that but three portions of the code are thus involved, Section 13a

and paragraphs (a) and (e) of Section 13. They brand as unlawful transactions which by differentials in sales price, rebate, discount and the like result in discrimination between purchasers and tend to create monopolies and stifle competition.

Appellants open their challenge with a reference to a decision of the Supreme Court of the United States rendered in 1901, Bement and Sons v. National Harrow Company, 186 U. S. 70, 22 S. Ct. 747, 46 L. ed. 1058. Action had been instituted in the New York State Court for damages arising from breach of contract for the sale of farm implements, and the plaintiff had recovered. The court observed that the sole federal question involved, in the appeal from an opinion of the court of appeals affirming the judgment, was the validity of the contracts in view of the act of Congress designed to protect trade against unlawful restraint (Sherman Anti-Trust Law). The plaintiff had taken the position that only the Attorney General of the United States could bring an action under the statute, except that under one section of it (7) any person aggrieved might himself sue in a federal court. Reaction of the court to this contention was: "Assuming that the plaintiff is right so far as regards any suit brought under that act, we are nevertheless of opinion that anyone sued upon a contract (this action originated in the state court) may set up as a defense that it is a violation of the act of Congress, and, if found to be so, that fact will constitute a good defense to the action." So when this decision was made it was definitely held that the defendant in a suit in a state court on a contract offending against the Anti-Trust Law could take advantage of the infringement by plea.

As late as 1942 this principle was again recognized by the United States Supreme Court when in Sola Electric Company vs. Jefferson Electric Company, 317 U. S. 173, 63 S. Ct. 172, 87 L. ed. 165, Mr. Chief Justice Stone wrote: "This Court has declared that anyone sued upon a contract may set up as a defense that it is in violation of the Sherman Act. E. Bement & Sons v. National Harrow Co." He added that it had been decided "in Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U. S. 227, 53 L. ed. 486, 29 S. Ct. 280, that a vendee of goods purchased from an illegal combination in pursuance of an illegal agreement, both in violation of the Sherman Act, can plead the illegality in defense to a suit for the purchase price."

The Supreme Court of New York in the case of Remington Rand v. International Business Machines Corporation, 3 N. Y. S. 2d. 515, referred to the decision in the Bement case, supra, and announced the rule that a litigant in a state court could not rely upon the federal statute for affirmative relief, but could resort to it as a defense in an action on a contract executed in contravention of that law. While the decisions we have so far cited dealt with the Sherman Anti-Trust Law, the Supreme Court of New York reiterated the rule in Stock and Sons v. Jacobson, 18 N. Y. S. 2d. 200, where the defense was predicated upon the Robinson-Patman Act.

The same general principle was applied in Pratt v. Paris Gaslight and Coke Company, 168 U. S. 255, 42 L. Ed. 458, when it was held that jurisdiction of a state court was not affected by an issue of the invalidity of a patent as an incident to a defense, although that court could have exercised no jurisdiction had the matter been presented to support a recovery.

The appellee insists that there are vital distinctions between the Sherman Anti-Trust Law on the one hand and the Clayton and Robinson-Patman Acts on the other that preclude application of the same rule relative to defenses interposed under both. At the outset he contends that "contracts, conspiracies and combinations" under the former were inherently illegal at common law, while "discriminations in price, services, facilities, discounts, rebates, etc., were not unlawful at common law and * * * became so under Federal laws for the first time by adoption of the" latter. Upon turning to 41 C. J. page 99, given as authority for the first statement, we find the language: "All contracts, combinations, or agreements which create or *tend to create* a monopoly are unlawful at common law * * *," yet the words underscored are identical with the ones appearing in Section 13, supra, under which one of the pleas was filed.

Among authorities given for the text is our decision in Stewart et al. v. Stearns & Culver, 56 Fla. 570, 48 So. 19, where was written: "The validity or invalidity of an agreement that in operation *tends to restrain trade or to monopolize* is in general determined by the element of whether it is or is not injurious to the public. If injurious in any perceptible degree to any considerable portion of the public, the agreement is contrary to public policy, and will not be enforced." (Again we have supplied italics.)

We do not find such difference between the phraseology of the Sherman Anti-Trust Law and the subsequent two acts as would justify a ruling that violation of the one could be employed as a defense, but a violation of the others could not. When the real design of laws of this character is borne in mind, Stewart et al. v. Stearns and Culver, supra, any difference between the one and the other two becomes quite obscure. It is our view that the availability of the defenses was properly decided in Stock and Sons v. Jacobson, supra.

But the principal distinction, so the appellee urges, derives from the dissimilarity in the language used because in the Sherman Anti-Trust Law is the statement: "Every (such) contract * * * is * * * declared to be illegal," while Section 13a, supra, merely provides: "It shall be unlawful for any person * * * to be a party to, or assist in, any transaction * * * which discriminates * * *." So it is argued that by the former the contract itself is illegal; by the latter only the discriminations are unlawful. Here, too, we fail to find such a contrast as would furnish sound reason for contrary rulings as to relevancy of the defenses.

Appellee stresses the opinion in Connolly v. Union Sewer Pipe Company, 184 U. S. 540, 22 S. Ct. 431, 46 L. Ed. 679, as authority for his position, but we believe careful study will reveal an essential difference between the factual situation there and here. Briefly, according to the cited case, purchasers of pipe attempted to defeat recovery upon notes they had signed to evidence the purchase price, because the seller had combined with other dealers in restraint of trade. The court found that the "purchases by the defendants had no necessary or direct connection with the alleged illegal combination," and that the defenses for that reason were not tenable. We think the criticism of disconnection between the alleged violation and the obligation there is not present here where the amount of the notes, if the pleas be true, was affected by the transgression claimed and the purchase price for which notes were given was enlarged by reason of the discrimination. See Continental Wallpaper Company v. Voight and Sons Company, supra.

From the authorities it appears that the courts will not lend their aid toward the enforcement of a contract which will further the violation of the law. If for that reason recovery will be denied the plaintiff where he and the defendant may both be parties to the contract in contravention

of the act, why would a defendant not a party, but a victim, be refused the same advantage? No reason occurs to us.

We reach the decision that the pleas, judging them by their substance, irrespective of any criticism as to their form, were appropriate, and in arriving at this view we have not overlooked the fact that the action was based on promissory notes instead of the contract for sale itself. That the suit was not based upon the contract, but upon notes which evidenced amounts due under the contract does not, in our opinion, alter the situation. Embrey v. Jamison, 131 U. S. 336, 9 S. Ct. 776, 33 L. Ed. 172.

No necessity appears for further discussion of the questions we analyzed in the beginning. We must, however, decide what procedure should be followed by the trial judge to effectuate our judgment. We have said that appellants remarked the uselessness of referring to the transcript. There is sharp difference of opinion between counsel on the matter whether the court determined the controversy on the facts as well as the law. Despite this contention of the appellant, the appellee has repeatedly alluded to the testimony.

The judge recited that the matter was being heard upon "application for entry of final judgment." He adjudged that plaintiff recover, stating in detail the amounts due on the notes for principal and interest and also for attorney's fees and costs. A few days beforehand he had entered his "order on pleadings and pre trial conference," concluding with the direction to counsel for plaintiff to prepare a judgment. It is largely from the recitals in this order that we glean the extent of his consideration.

There is no dispute about the plaintiff's having proved its case, so we need decide whether the judge thought recovery was justified despite testimony in support of the pleas, they being inappropriate, or was warranted even if the testimony were taken into account, it being insufficient.

Aside from the defense of conditional delivery, which has been abandoned, he observed: "As to the defense of illegality of consideration or unlawfulness of the notes under the Federal Statutes * * * I am of the opinion that under decisions of the Supreme Court of the United States such defense cannot be offered in a suit to collect the purchase price of merchandise sold and delivered and affected by the provisions of that act. The act itself prescribes the only remedies available to persons affected by its violation and no

other method of relief is to be had." He continued, as we have already quoted, "The contract of sale was not under these decisions Malum in se but Malum prohibita only." Then he concluded: "I am, therefore, of the opinion that all questions of fact and law on which the rights of the parties depend are settled in favor of the plaintiff and under Hillsborough County vs. Sutton, 8 Southern 2nd, 401 (150 Fla. 601) this court should enter judgment in its behalf on the pleadings *and fact* disclosed by the record in this cause." (Italics supplied.)

In the cited case was posed the question whether final judgment could be entered at the conclusion of a pre-trial conference, the procedure followed here. It appears to have been the ruling that such method was proper where material facts were not controverted. The court said: "If the conference progresses to the point of eliminating all questions of fact then the court may give judgment according to law on the facts before him." In the light of this rule, then, the judge must have felt that he should enter a judgment because of a situation where questions of fact had been eliminated and only a question of law remained for his determination. Such a condition obtained so far as the plaintiff's case was concerned, but there is much in the record to indicate that issues of fact were not absent if testimony relative to the pleas were to be considered. In other words, the moment the issues raised by the pleas are contemplated disputed facts appear. We think this is readily apparent from appellee's brief, where much space is devoted to the evidence. For illustration, we find in it the statement that it was "within the province of Judge Parks, who heard the * * * testimony * * * and saw the demeanor of this witness, to apply to his testimony the rule: '*Falsus in uno, falsus in omnibus,*'" etc., referring to a means by which may be judged the testimony of a witness whose statements are alternately true and untrue.

It is evident to us that the trial court thought it proper to enter the judgment pursuant to pre-trial conference on the theory that the facts supporting the declaration were not disputed and that conflicting testimony on the pleas would not preclude such a course inasmuch as the pleas being improper, the evidence relevant to them could be ignored. As we have reached a contrary view about the pertinence of the defenses, it seems fitting for the cause to be

reversed that the issues raised by the pleas as they now stand; or are eventually settled, may be tried.

The judgment is, therefore, reversed with directions for further proceedings conformable to this opinion.

Reversed.

Brown, Chapman, Adams and Sebring, J. J. concur.
Buford, C. J., and Terrell, J. J. dissent.

DISSENTING OPINION.

Buford, C. J., dissenting:

I dissent because I think the sales contract which constituted a part of plea was free of discrimination and therefore the pleas were of no avail.

[R. 621-622.]

IN THE SUPREME COURT OF FLORIDA, JANUARY TERM, A. D. 1945.

EN BANC.

BRUCE'S JUICES, INC., a Florida Corporation, *Appellant*,

vs.

AMERICAN CAN COMPANY, a New Jersey Corporation, *Appellee*.

An Appeal from the Circuit Court for Hillsborough County, L. L. Parks, Judge.

Cody Fowler and Shackleford, Farrior & Shannon, for Appellant.

John M. Allison, Harry B. Terrell and Whitaker, Whitaker & Terrell, for Appellee.

OPINION—Filed April 17, 1945.

PER CURIAM:

On rehearing granted after arguments and briefs submitted, we are of the opinion that the defense attempted to be interposed was not available under the facts submitted in evidence to the court below and, therefore, the judgment should be affirmed.

It is so ordered.

Terrell, Brown, Buford and Sebring, J. J. concur.

Chapman, C. J., Thomas and Adams, J. J. dissent.

CONCURRING OPINION.

SEBRING, J., concurring:

Upon consideration of the matter I have come to the conclusion that the subject matter of the pleas is not legally available as a defense in the state courts in a common law suit on the promissory notes involved. I therefore concur in the conclusion that the judgment of the Court below should be affirmed.

DISSENTING OPINION.

Upon rehearing granted we adhere to the original opinion. Chapman, C. J., Thomas and Adams, J. J. concur.

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## IN THE SUPREME COURT OF FLORIDA.

(Title omitted.)

ORDER DENYING PETITION FOR REHEARING—June 29, 1945.

Counsel for Appellant having filed in this cause Petition for Rehearing and having been duly considered, it is ordered by the Court that said Petition be and the same is hereby denied.

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## IN THE SUPREME COURT OF FLORIDA.

(Title omitted.)

ORDER STAYING MANDATE—June 30, 1945.

Upon consideration of the motion of counsel for Bruce's Juices, Inc., for an order staying the mandate herein, pending an application to the Supreme Court of the United States for a writ of certiorari, it is hereby

Ordered, that the mandate of this Court be, and the same hereby is, stayed pending appellant's petition in the Supreme Court of the United States for a writ of certiorari, provided said petition for certiorari is presented in said Supreme Court within the time required by law.

R. H. Chapman, Chief Justice of the Supreme Court of the State of Florida.

## APPENDIX B.

### The Statute Involved.

SECTION 13, TITLE 15, U. S. C. A.:

DISCRIMINATION IN PRICE, SERVICES, OR FACILITIES—PRICE; SELECTION OF CUSTOMERS.

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them; *Provided,* That nothing contained in sections 12, 13, 14-21, 22-27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing contained in sections 12, 13, 14-21, 22-27 of this title shall

prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing contained in sections 12, 13, 14-21, 22-27 of this title shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

BURDEN OF REBUTTING PRIMA FACIE CASE OF DISCRIMINATION.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing contained in sections 12, 13, 14-21, 22-27 of this title shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

PAYMENT OR ACCEPTANCE OF COMMISSION, BROKERAGE OR OTHER COMPENSATION.

(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or mer-

chandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

PAYMENT FOR SERVICES OR FACILITIES FOR PROCESSING OR SALE.

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

FURNISHING SERVICES OR FACILITIES FOR PROCESSING, HANDLING, ETC.

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

KNOWINGLY INDUCING OR RECEIVING DISCRIMINATORY PRICE.

(f) It shall be unlawful for any person engaged in commerce in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section. Oct. 15, 1914, c. 323, § 2, 38 Stat. 730; June 19, 1936, c. 592, § 1, 49 Stat. 1526.

SECTION 13a, TITLE 15, U. S. C. A.:

DISCRIMINATION IN REBATES, DISCOUNTS, OR ADVERTISING, SERVICE CHARGES; UNDERSELLING IN PARTICULAR LOCALITIES; PENALTIES.

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both. June 19, 1936, c. 592, § 3, 49 Stat. 1528.

## APPENDIX C.

### Illustrations of Failure to Produce Records or Permit Examination.

"Q. Will you produce from the records of your corporation—and this is the general office of the American Can Company—a list of the cans purchased by the various canning plants of the California Packing Company that purchased packers' cans in 1937, 1938, 1939, 1940, 1941 and 1942, and showing likewise from which plant or warehouse, referred to as distributing point, of the American Can Company these cans were delivered?

A. You are referring now only to those sizes that are competitive with the sizes purchased by Bruce's Juices?

Q. No, sir, I am referring to all cans referred to as packers' cans.

Mr. Allison: To the question or request as propounded the plaintiff objects for the reason that its scope goes beyond the present or possible future issues of this cause; it is to that extent immaterial and irrelevant.

Further, that the scope of the question seeks disclosure of confidential business matters between the plaintiff and (fol. 178) other customers which are not subject to disclosure without consent of such customers." (R. 134-135.)

"Q. Mr. Nugent, what was the amount of packers' cans purchased by the California Packing Corporation and delivered at that company's plant at Tampa, Florida, in year 1942?

Mr. Allison: To which question the plaintiff objects upon the ground that it seeks disclosure of confidential business relations with a customer other than the defendant and goes beyond the scope of this inquiry.

And the witness is instructed to refuse to answer the question, and the propriety of the question is certified to the Circuit Court for decision." (R. 138.)

"Q. Do you know how many customers, the total amount of the purchases of the customers who did not receive discounts?

A. It is in the records, but I do not know offhand.

Q. Will you produce that figure for us?

Mr. Callahan: That question is objected to as immaterial, incompetent and improper and not within the scope of this examination or the issues involved in this suit.

The witness is instructed not to answer the question, and the propriety of the question is certified to the Circuit Court for ruling." (R. 237.)

"Mr. Fowler: Gentlemen, I intend to ask this witness and likewise perhaps supplement the information which I seek to obtain from this witness by the evidence of Mr. George Madge, assistant comptroller of the American Can Company, now in this room, questions in substance as follows: to produce the invoices for the sale of cans to each of the corporations enumerated repeatedly in these proceedings for each year covered by this investigation, including the part of the year 1936; to produce the ledger sheets showing the amount of total charges made to each of these (fol. 321) customers for each separate year—and when I say each year hereafter it will be intended to mean from June 19, 1936, to the end of that year as being included in one of those years—which ledger sheet or other record shows the total charges for cans made against each of these corporations, the amount of cash payments and the amount of discounts and allowances and credits which make up the difference between the cash payments and the total amount of such charges; and if allowances and discounts and credits other than cash are disclosed, to investigate the details thereof.

Mr. Allison: It is further informally understood that should the foregoing questions be propounded to the named witnesses, or to any officers or employees of the plaintiff, called by defendant, the plaintiff would object to such questions, except as to the following corporations, to wit: Border Packing Corporation, Engelman Products Company and Taormino Corporation, for the reason that the same are immaterial and irrelevant to the issues and possible issues in this cause, that the same are beyond the scope of the order of court, and that the same constitutes a fishing expedition into the records of the plaintiff in support of its pleas, which effort goes beyond the purview of the statute sought to be invoked thereby, and seeks to make available to the defendant for his information and benefit confidential business relations with competitor customers of the plaintiff.

And the plaintiff announces that it would and will instruct any and all witnesses to decline to answer the foregoing questions as to the five corporations, other than the three

above named, and certifies the question to the Circuit Court for determination as to its propriety and admissibility." (R. 244-245.)

Mr. Callahan: In so far as an examination of Exhibits 10 to 14 is concerned the company will permit an examination of its records in so far as we are permitted to do so by customers of this corporation.

Mr. Fowler: Naturally that would be of no value to us. If it is so restricted we cannot obtain the information. In other words it is our contention that that proviso is equivalent to a declining to permit us to do so.

Mr. Callahan: In view of the position taken by counsel it is my judgment that the question be certified to the Circuit Court for determination as to its propriety, and the witness is instructed not to answer." (R. 239).

Examination of Allen Herbert Nugent, General Sales Manager for American Can Company:

Q. I will ask you if each of the following corporations did not also receive a discount under the contract for Sanitary cans purchased in the years 1936 through 1942 inclusive, the corporations in question being: Stokely Brothers & Company, Inc., Hawaiian Pineapple Company, Ltd., Libby, McNeill & Libby, Inc., Morgan Packing Company, and The Great Atlantic & Pacific Tea Company.

(fol. 266) A. You use the word "Sanitary," which I presume is the same as if you used the term "packers' cans." If that is correct then these companies did receive quantity discounts on their purchases in each of the years mentioned.

Q. Were those purchases arrived at by figuring the amount of Sanitary cans purchased as provided for in your contract?

A. Do you mean in our packers' cans contract?

Q. I mean in the form contract that was introduced in evidence after being produced by the attorney for the American Can Company, and in which contract I have not seen the words "packers' cans" used.

A. The purchases made by these companies under the packers' can contract were used in arriving at the amount of the discount, if any, to which each company was entitled.

Q. Now as a matter of fact you do not figure those discounts in your department, do you?

A. I do not.

Q. Therefore you have no personal knowledge as to how they are all figured, or what cans are included in those figures, do you?

A. Yes, I do. There is a statement attached to either the credit memorandum or the check as the case may be which we receive from the auditing department and which is forwarded to the customer through our department.

Mr. Fowler: I will call on you to produce those statements for the following corporations, and each of them, for the following years and each of them, to wit: California Packing Corporation, Stokely Brothers & Company, Inc., Hawaiian Pineapple Company, Ltd., Libby, McNeill & Libby, Inc., Morgan Packing Company, The Great Atlantic & (fol. 267) Pacific Tea Company, for the years 1936 through 1942 inclusive.

Mr. Allison: To which voice crying in the wilderness the plaintiff answers that it objects to the request for the reason that the information sought thereby is immaterial, irrelevant and improper to the issues formed and to be formed in this cause, or which may be formed in this cause.

Second, the information sought goes far beyond the scope of the issues herein.

Third, the information sought is that of a confidential nature between plaintiff and a customer other than the defendant, and can be solely for the information and immediate benefit of the defendant, without reference to the issues in this cause.

Fourth, the question is a continued reiteration of the same exploration heretofore conducted by the defendant herein and to which the plaintiff has consistently interposed these objections. The propriety of the request is certified to the Circuit Court for determination as to admissibility; and the plaintiff declines to furnish the information requested. (R. 201-203.)

Direct examination of William B. Ong, Auditor of the American Can Company:

Q. Turning to our Exhibit A, which is your first large sheet, am I right in concluding that this shows that in the months of April to November you had $16,000 of convention expenses?

A. $18,619.

Q. Now, who did you say decided that they would put those expenses in as an item here in this exhibit? Did you decide that?

A. No, the convention expense has always been distributed in our selling expense, as part of our selling expense.

Q. This exhibit also does not show how you divided these items of expense between the American Can Company and any of its subsidiaries, does it?

A. It is altogether in the statement.

Mr. Fowler: Gentlemen, I intend to ask this witness and likewise perhaps supplement the information which I seek to obtain from this witness by the evidence of Mr. George Madge, assistant comptroller of the American Can Company, now in this room [room], questions in substance as follows: to produce the invoices for the sale of cans to each of the corporations enumerated repeatedly in these proceedings for each year covered by this investigation, including the part of the year 1936; to produce the ledger sheets showing the amount of total charges made to each of these (fol. 321) customers for each separate year—and when I say each year hereafter it will be intended to mean from June 19, 1936, to the end of that year as being included in one of those years—which ledger sheet or other record shows the total charges for cans made against each of these corporations, the amount of cash payments and the amount of discounts and allowances and credits which make up the difference between the cash payments and the total amount of such charges; and if allowances and discounts and credits other than cash are disclosed, to investigate the details thereof.

Mr. Allison: It is further informally understood that should the foregoing questions be propounded to the named witnesses, or to any officers or employees of the plaintiff, called by defendant, the plaintiff would object to such questions, except as to the following corporations, to wit: Border Packing Corporation, Engel-

man Products Company and Taormino Corporation, for the reason that the same are immaterial and irrelevant to the issues and possible issues in this cause, that the same are beyond the scope of the order of court, and that the same consitutes a fishing expedition into the records of the plaintiff in support of its pleas, which effort goes beyond the purview of the statute sought to be invoked thereby, and seeks to make available to the defendant for his information and benefit confidential business relations with competitor customers of the plaintiff.

And the plaintiff announces that it would and will instruct any and all witnesses to decline to answer the foregoing questions as to the five corporations, other than the three above named, and certifies the question to the Circuit Court for determination as to its propriety and admissibility.

(fol. 322) Mr. Fowler: Inasmuch as it is the defendant's contention that the five corporations, whose records we will not under the instruction of counsel for the plaintiff be permitted to see, are the principal customers listed, and inasmuch as counsel does not feel it worth while to do a vain and useless thing, he will not interrogate further, and will join with counsel for the plaintiff in this one item [item], and that is certifying the question to the court, without precedent or prejudice (R. 243-245).

## APPENDIX D.

### Testimony of Leonard B. Smith.

MR. ALLISON:

Q. Please state your name?

A. Leonard B. Smith.

Q. Place and residence and occupation?

A. 911 Park Avenue, New York City. I am a lawyer and General Counsel for the American Can Co.

Q. You are a member of the Bar of the State of New York?

A. Yes, sir.

Q. How long have you been the General Counsel for The American Can Co.?

A. Ten years.

Q. Were you occupying that position at the time the Plaintiff's Exhibits Nos. 2 to 14, inclusive, were compiled?

A. Yes sir.

Q. Did you participate in the preparation of these schedules and these statistics?

(fol. 735) A. I participated in the preparation of this plan that was embodied in the book—Plaintiff's Exhibit 2 and also in the preparation of the Can Contracts containing Sales Discounts that have been introduced.

Q. Those are Plaintiff's Exhibits 2 to 28-A?

A. Yes, sir.

Q. Mr. Smith, will you please state in your own words the facts which entered into the preparation of those exhibits and the existing situation at the time they were prepared.

MR. FOWLER: To which we object, if the Court please, because it states reasons and motives, it calls for opinion testimony, and states why in his opinion certain things were done, when the only thing that has any bearing on this case is what was done, and the testimony would be improper, incompetent and irrelevant.

THE COURT: I will let him answer the question.

A. I can state what was done.

Q. That is what I have asked.

A. When the Robinson-Patman Law was passed it was apparent to the officials of The Company that all of the packers cans contracts with the Company would have to be cancelled. Those contracts contained certain unit discounts

and allowances to their customers that were permissible under the Clayton Act but could not be sustained under the requirements of the Robinson-Patman Law. And the Officials of the Company then set about to devise a system of quantity discounts that could be sustained by proof which would comply with the requirements of the Robinson-Patman Law.

Mr. Gordon Kellog, who is the Vice-President in charge of sales, made an estimation that, although there was no difference in the cost of manufacture of the cans, there was a (fol. 7,6) saving in the sales expense to the large customers which he estimated would run as high as 5 per cent. That was merely an estimate that he made from a knowledge of the business because previously no account of the sales expense of the Company had ever been kept, divided up among the different customers or classes of customers, but the sales expense was kept in a single amount for the entire Company.

In order to make any scale of quantity discount legal under the Robinson-Patman Law it was necessary that there should be proff that there was a saving in sales expense equal to the amount of the discount due only to quantities of purchases; and it was recognized that there might be differences in sales expense due to an infinity of different reasons, and they all had to be eliminated except the difference that was due to the difference in quantity alone; so that a comparison between the expense of selling to individual customers was of no value at all because there was no proof of how much of it was due to the difference in quantity; so then it was finally decided that if all of the packers can customers of the Company were divided into three classes consisting of the largest customers, the medium sized ones, and the smaller ones, that is, the division made solely on the basis of the annual volume of sales so that all kinds of customers, indiscriminately, good, bad and indifferent, were thrown into these three classes without any dividing line except solely the dividing line caused by the difference in volume of purchase, then, if it appeared that a detailed accounting of costs showed that there was a difference in sales expense between those three classes, and that this difference persisted month after month and year after year, then that difference must be due to the difference in quantity of purchases because there was no other differ- (fol. 737) ence between the classes: all the other

differences causing differences in sales costs would be washed out. It was considered that, in the number of packers cans purchasers which was fourteen or fifteen hundred, it was large enough to accomplish that washing out of all the differences of costs except differences that were caused by the difference in volume.

And I worked on this with the officials of the Company for several months and we got up this system of cost accounting, which is embodied in this little book "Packer's Cans Sales—Roadmen's Expense", in which there was no attempt to keep account of cost of sale to any individual customer, and all of the elements that went to make up the sales costs were segregated and kept account of in the manner shown in this book divided between the three classes of customers, the largest customer, the medium sized and the smaller.

That system of cost accounting was put in effect April 1, 1937. In the meantime, new contracts had been put out and signed with the customers containing the sale of quantity discounts which is in them now, based on the estimates that I have spoken of, that the officials had made without really any basis except their own knowledge of the business.

In order to induce customers to sign these new contracts there was made a flat reduction of eight per cent in the price of the sanitary cans, so as to induce the cancellation of all of the old contracts and the acceptance of the contracts containing the new scale of quantity discounts.

This cost accounting was kept month by month, and then at the end of each year when the annual volume of sales was known and the quantity discounts were calculated, then a statement was made up to see whether the saving approved in the cost expenses was equal to the amount of the discounts (fol. 738) that were paid, and it proved that the saving was equal and a little bit more.

The result of this cost accounting showed two things?

1. It showed that the saving in the selling expense to the customers in the very highest bracket, what they call Class "A", I think, was a little more than 5 per cent discount which they received. It varied slightly but I think it was always between five and six per cent.

2. It showed that the total aggregate saving of sale expense to all of the customers who received discounts was greater than the total aggregate of all of the discounts paid.

That system was continued for, I think, four years and nine months. It involved a very laborious burden on the sales force and the accounting force, and took up a great deal of the salesmen's time and a great deal of accounting work, but the result of it as shown in these statements are offered in evidence, and while these percentages varied slightly up and down from time to time; they remained to all intents and purposes substantially permanent and we considered that they proved beyond the possibility of dispute that the saving of sales expense which they showed was due to the difference in the quantity of purchases because there was no other difference between these three classes of customers.

Cross-examination.

Mr. Fowler:

Q. Mr. Smith, I believe you stated that the American Can Co. recognized that it could not give any discounts that it could not justify in savings. Is that correct?

A. Not only that, I said it could not give any discounts that it could not justify under the Robinson-Patman Law. It was not every kind of a saving that would justify a dif- (fol. 739) ference in price or discount under the Robinson-Patman Law. There were only two kinds. The Robinson-Patman law specified difference in methods, and there might be an infinity of other reasons difference of cost but the only thing that would justify a difference in price under the Robinson-Patman Law would be a difference in the method and in the quantity in which the goods were sold and delivered.

Q. In other words these discounts here in your Contract are *prima facie* illegal unless, as a matter of fact, you can justify those discounts in costs either from the manufacturers sale or delivery resulting from the different method or quantities in which such commodities are to such purchases sold and delivered?

A. Yes, sir.

Q. And each time that is attempted the burden is on you to justify those discounts, is it not?

A. Yes sir, I think so.

Q. You refer to small customers as the "C" group, and the way you classified them, they were all customers who buy less than $500,000.00 of cans a year?

A. Yes, sir.

Q. The way you classified them?

A. Yes, sir.

Q. Under your plan, take for example the California Packing Corporation, with a factory at Tampa, another one in Utah, two or three in California, and one in Ohio, it is your contention that you can add all those purchasers together in order to get the total of purchases to place them in one of these brackets placed in your contract.

A. That is proved by the way we kept the accounts.

Q. That is the way you did it?

A. Yes, sir.

Q. When these costs come in who allocates them on types that are between "A", "B" and "C" accounts?

A. That is all done in this book Plaintiff's Exhibit 2. It shows the way in which the road men have to keep account of their time so that their time can be divided up to (fol. 740) make the different classes and the book describes how it is allocated between the different classes, and that is all done then in the Auditor's Department, I mean the work of writing the books.

Q. Who says whether a special item of expense that comes in that there may be some doubt about goes into which one of these accounts, who passes on that?

A. The Salesmen *have* to keep a daily record of the time that he has spent and no one questions that. He has to write down every day how much time he spent on customers in each of these three brackets.

Q. And he is the one that allocates between the different customers?

A. He allocates his own time, yes sir.

Q. Could a man selling asparagus in California, buying cans from you, get together with a canner of citrus in Florida and purchase together to get in one of these classes?

A. No sir, we do not permit any co-operative buying associations that do not operate canneries, we do not allow them any quantity discount.

Q. Could you tell me why, in this little booklet—"Plain*rigg*'s Exhibit No. 2, you charged commission to all those in Class "C" when most of them, for example those in Florida do not have any commission charged against their purchases?

A. Well, it was a sales expense.

Q. In other words, if the commission is charged against the "C" customer in Ohio, it is put in the general pot and charged against all the customers including those in Florida?

A. We are not allowed to make any difference in price. We have to charge all the same whether they were brokers or not, under the Robinson-Patman Law.

Q. You are allowed to make allowances for actual savings? (fol. 741)

A. Only for savings due to the two causes that I mentioned or the different methods or the quantities.

Q. Then if you paid commissions to the small canners elsewhere, it is charged against all small canners including those in Florida where there is no commission paid?

A. It is charged against that Class, not against any individual canner at all, against the Class as an expense of doing business with the customers in the small class. All of the sales expense has to be put into this account and it is sometimes necessary to do business with small canners by means of brokers but I do not think it ever is necessary to do so with large customers. That is sales expense and it has to be put in the class of customers in which it is incurred.

Q. In other words irrespective of how many or how few times your salesmen have to call on an individual customer or how few or how often your mechanics or whatever you call them, call on your customers to work on his closing equipment or machinery, he is put in the same class irrespective to what his personal costs to you or your Company are.

A. Those are differences of expense for which the Law does not allow difference in price, but the only difference in cost for which any difference in price is justified, is a difference in expense that is due to method or to quantities and we were keeping account of the difference that was due to the different quantities, and that is all. And, as I have explained, the only way that we knew of, and the only way that I know of or ever heard of to keep account of a difference in cost due only to quantities or sales is to classify the customers according to the quantity and see what is the difference between those different classes because then all other causes of difference in expense are indiscriminately (fol. 742) thrown in together and they wash each other out.

Q. In doing that you classified the little customers, including Alaska, Hawaii and all other States where you do business?

A. All of the customers that come within the quantity classification. I do not think that applied to customers outside of the United States. I do not recall about that.

Q. You would not say that is not true?

A. I do not recall that. This is six or seven years ago, but I remember very well in a general way when it was done, but I do not recall whether it included any customers outside of the United States.

Q. But there are parts of the United States where there are a large number of small canners, are there not?

A. Yes, sir.

Q. What was the total sales cost in relation to the total sales; that is the percentage of the total sales costs in connection with the total sales of the American Can Co.?

A. That is shown in the exhibit. It varied from time to time. I don't know just what it was.

Q. I will ask you if it was not approximately 2 per cent?

A. I could not say that. I do not remember the figures.

Q. Would you say that is not correct: look at your exhibits there: could you tell us that?

A. These Exhibits 5 to 9 show the total sales expense *expense* each year but I don't know what the total sales were for those years.

Q. You divide five, I think, into the nineteen million and arrive at 1 per cent: in other words I think we contend that they are actually 2 per cent although they allow as much as 5 per cent (fol. 743) to a large number of their customers?

A. I do not know. I think that the total sales expense was more than two per cent but of course there might be a saving in the higher brackets more than the average of the sales expense for the entire business, because most of that expense might have been in the lower brackets so that a saving in the higher brackets might have been more than the average of the entire sum. (R. 571-578)

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945.

No. [redacted] 27

BRUCE'S JUICES, INC., a Corporation, *Petitioner*,

*v.*

AMERICAN CAN COMPANY, a Corporation.

On Certiorari to the Supreme Court of the State of Florida.

## REPLY BRIEF FOR BRUCE'S JUICES, INC., PETITIONER.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945.

No. 402.

BRUCE'S JUICES, INC., a Corporation, *Petitioner*,

*v.*

AMERICAN CAN COMPANY, a Corporation.

**On Certiorari to the Supreme Court of the State of Florida.**

## REPLY BRIEF FOR BRUCE'S JUICES, INC., PETITIONER.

*To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.*

The brief of the respondent is on its surface a plausible document. Its plausibility, however, is attained by the use of the following devices: (1) serious inaccuracies in the statement of facts; (2) argument of questions not before the Court; and (3) confusion of the simple issues involved. To bring into sharp relief these characteristics of respondent's argument it is necessary briefly to restate petitioner's position.

## The Petitioner's Position.

Petitioner was deprived of its federal right established by the Robinson-Patman Act by the action of the Florida court when it entered judgment without subjecting to trial the issues of fact raised by petitioner's pleadings. These pleadings alleged that the transactions which were the consideration for the notes sued on were unlawful under the Robinson-Patman Act.

To sustain this proposition petitioner has shown in its original brief: (1) that the defense of illegality available at common law and under the Sherman Act is likewise available under the Clayton and Robinson-Patman Acts; and (2) that the Florida court denied petitioner a trial on the issues of fact raised by its defense of illegality.

Petitioner, therefore, contends that the case must be remanded for a trial on these issues.

If, however, the Court should decide that the incomplete hearing of evidence below constituted a procedure which accorded an adequate protection of petitioner's federal right to a trial on the issues raised, two alternative propositions involving substantial federal questions become relevant. They may briefly be stated as follows:

(1) If the incomplete hearing below is to be considered a trial on the issues of fact raised by the pleas, respondent has not met the burden of justifying its price system which the Robinson-Patman Act imposes upon it. For it has refused not only to submit its witnesses to cross-examination but also to disclose its books of account which were the only direct evidence of the actual operation of its price system;

(2) The evidence introduced by the respondent affirmatively shows that it violated the Robinson-Patman Act by subjecting its smaller customers to a discriminatory price system which substantially lessened competition. The record demonstrates the truth of this proposition with respect to the underlying price system set up by respondent which affected each and every transaction between the parties

here. This scheme of unlawfully permitting respondent's large purchasers of cans to pool purchases made in their various plants throughout the country enables said large purchasers to secure the discounts up to 5%, and this scheme directly and inherently affected every transaction by petitioner out of which emerged the notes on which suit has been brought. The above statement is necessarily true in that petitioner, by reason of being only a small canner, did not have the purchasing power which its large competitors have as a result of the pooling of purchases made by them in their numerous plants. All other discrimination and inequality of treatment charged by petitioner are in addition to this all-pervasive scheme the effect of which has been to narrow the margin between petitioner's higher cost for cans and the uniform price at which it had to meet the competition of its larger rivals in the open market.

## The Respondent's Statement of Facts.

In its statement of facts respondent attempts to obscure these simple issues by assertions, some of which are merely misleading, some of which are less than the whole truth, and some of which actually contradict the record. The general purpose is to give the impression that there was in the court below a trial of the issue of illegality adequate to protect petitioner's federal right. The statement attempts further to give the impression that the legality of the respondent's price system was established by the evidence at this "trial". A subsidiary purpose is to create the impression that if there was any illegality only a small and unidentified portion of the transactions were tainted with it. We will, therefore, list numerically typical examples of the inaccurate or misleading assertions in respondent's statement of facts:

(1) *Quotation from Respondent's Brief, page 2:* "In part the renewal notes represented unpaid interest on the old notes. (R. 361-62.)"

*Comment:* The record shows that interest on the old notes was separately paid. The above statement has no support in fact. (R. 362, 421.)

(2) *Quotation from Respondent's Brief, page 2:* "None of the original notes . . . had been tied to a particular transaction."

*Comment:* This is misleading. The record shows that all of the notes are tied to the entire series of transactions. We contend that all of these transactions involved in this litigation are marked by violation of the Robinson-Patman Act.

(3) *Quotation from Respondent's Brief, page 2:* "The principal defense offered was the allegation that in some of the sales originally made . . . the respondent had unlawfully discriminated against the petitioner in violation of the Robinson-Patman Act."

*Comment:* The record shows that our principal allegation is that *all*—and not *some*—of the sales constituted violation of the Robinson-Patman Act. (R. 41-46.)

(4) *Quotation from Respondent's Brief, page 3:* "The record discloses the following: Bruce's Juices, Inc., the petitioner, is a processor of fruit juices operating canneries located at Tampa, Florida; Bridgeville, Delaware; Geneseo, New York; and Santa Rosa, Texas. It also has products canned for it at Vincennes, Indiana. (R. 378.)"

*Comment:* The record shows that Bruce's Juices, Inc., has intermittently carried on small operations at one or more of these points. (R. 483, 484, 488.) The intent here apparently is to give Bruce's Juices, Inc., the appearance of doing a nationwide business.

(5) *Quotation from Respondent's Brief, page 3:* "From 1928 to 1942. . . . The remainder of its [Bruce's Juices, Inc.] needs was purchased from The Continental Can Company. (R. 372.)"

*Comment:* The record shows that in all this time only one purchase was made from Continental and that was with the permission of American Can Company. (R. 378.)

The apparent purpose of this statement is to give the impression that respondent was furnishing only a part of petitioner's needs.

(6) *Quotation from Respondent's Brief, page 4:* "Petitioner was a difficult account to sell and service."

*Comment:* Nugent, for the American Can Company, testified that Bruce's Juices, Inc., was "one of our good accounts." (R. 192.)

(7) *Quotation from Respondent's Brief, page 4:* "The uncontradicted evidence in the present Record reveals that the cost of selling and servicing petitioner exceeded that of any other customer of respondent. (R. 353, 513, 536.)"

*Comment:* There is no evidence in the record of the cost of selling or servicing petitioner. The "uncontradicted" evidence referred to consists of derogatory statements of two adverse witnesses without factual support. We quote the strongest record reference against us on this point as indicative of what the respondent thinks is "uncontradicted" evidence.

> "Q. (By Mr. Allison) Mr. Slayton, you stated . . . that Mr. Bruce complained of the 3-12 cans sales in Texas. Is that the only complaint that he made?
> A. No sir, he made numerous complaints.
> Q. You mean over the period of years he complained?
> A. Yes sir, that is right.
> Q. About any particular thing or just everything?
> A. I think, my personal opinion is that he was a damned hard customer to serve and always complained." (R. 353.)

(8) *Quotation from Respondent's Brief, page 4:* "In addition, petitioner was a doubtful credit risk. In 1937 the respondent agreed to extend $125,000 in credit to the petitioner by accepting a series of interest bearing notes up to that amount."

*Comment:* The first sentence in the above quotation gets no support in the record. It is negatived by Bruce's testimony. (R. 88 and 89.) More significantly we find Nugent,

Sales Manager of American Can Company, testifying (R. 192) "... we considered the Bruce's Juices as being one of our good accounts, ..."

The second sentence in the above quotation distorts the record which shows that the line of credit was volunteered by American Can Company without a request. Bruce testified (R. 89):

> "... I never asked them for a line of credit, but they offered to extend me a line of credit, and I said, what is your idea, what do you propose, because I had my arrangements practically made with the Continental Can Company, and they said, we will figure it out and let you know, and they met me on a Sunday afternoon at my hotel and *they told me they would extend me a $125,000 line of credit*, and *I told them that was more than I needed*'" (Italics supplied).

(9) *Quotation from Respondent's Brief, page 5:* "As already noted, petitioner did not and could not establish what portion of the indebtedness represented by the renewal notes arose after the enactment of the Robinson-Patman Act."

*Comment:* This is a misstatement. Actually all indebtedness arose after the Act had gone into effect. (R. 169, 254, 255, 292, 362, 579, 580).

(10) *Quotation from Respondent's Brief, page 5:* "... the alleged discrimination against petitioner in the sale of small serving cans is not charged to have occurred before September 1939 (R. 182), ..."

*Comment:* The record citation does not support this statement. It is true only as to secret price discrimination. The quantity discount, freight allowance and other discriminations were applicable to small cans prior to that date.

(11) *Quotation from Respondent's Brief, page 5:* "The alleged discrimination through use of quantity discounts during the period when the indebtedness arose was confined to companies described as competing with the petitioner in the *grocery* size can fruit juice field. (R. 506.)"

*Comment:* The record reference does not support this statement. The Morgan Packing Company and the Hawaiian Pineapple Company were also competing in the small can field. Hence, discrimination was charged in both fields. But in addition to this, the scheme of classifications of customers and the overall discounts applied to both small and large cans. (R. 129, 130, 171 and 373.)

(12) *Quotation from Respondent's Brief, page 5:* "Petitioner could not and did not offer any evidence to establish what portion of the total amount of the four notes represented a prior indebtedness arising out of the purchase of the grocery size cans."

*Comment:* This statement is immaterial if true, because the scheme of discount by aggregate dollar volume of annual sales comprehends all cans bought whatever their size or price.

(13) *Quotation from Respondent's Brief, page 6:* ". . . respondent was accused of furnishing equipment for closing cans without charge to competitors, while charging petitioner for such machinery. No effort to prove this charge was ever made and it was abandoned below."

*Comment:* There is no record citation for this statement. It is disputed by Bruce's testimony (R. 73) and there is no evidence to contradict him.

(14) *Quotation from Respondent's Brief, page 7:* "Under Florida practice each party understood that if it failed to show that enough evidence could be produced to require submission to a jury, the law suit might be terminated."

*Comment:* There is no requirement in Florida practice that the defendant establish a *prima facie* case by producing evidence at a pre-trial conference. The sole purpose of the conference as stated by the Judge, was to simplify the issues. (R. 58.) [1]

[1] The authority for such procedure is a rule of the Supreme Court of Florida adopted by the Circuit Court for Hillsborough County which directs that a pre-trial conference may be had to consider:

(15) *Quotation from Respondent's Brief, page 7:* ". . . certain questions asked witnesses were temporarily not answered and were certified to the trial court for ruling . . . There was ample opportunity to secure these rulings: but no attempt was made by petitioner to secure such rulings."[2]

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"(1) The simplification of the issues;

"(2) The necessity or desirability of amendments to the pleadings;

"(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

"(4) The limitation of the number of expert witnesses;

"(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

"(6) Such other matters as may aid in the disposition of the action.

"The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice." 141 Fla. 327, 328-329

The pre-trial conference was not and was never intended to pass upon questions in issue and there is no basis in Florida law therefor.

[2] Testimony was taken before the court in Florida, on some three occasions in New York, and again before the Florida court in October, 1943.

The record shows particularly in reference to the testimony of Mr. Nugent, General Manager (R. 103-220), some 55 questions which counsel for the American Can Company instructed the witnesses not to answer and which were certified to the trial court.

American Can Company likewise introduced in evidence some exhibits (1-14) in an endeavor to justify quantity discounts given by it as a matter of practice to its large purchasers. At the same time it declined to permit investigation of the original records from which these exhibits were compiled.

Objections were made to these exhibits, which objections were never ruled upon and the exhibits were never admitted in evidence. (R. 455-458.)

*Comment:* This statement is contrary to fact. The petitioner pressed for rulings until the judgment of the lower court made all the evidence irrelevant. (R. 578-579.)

(16) *Quotation from Respondent's Brief, pages 7 and 8:* "The questions asked [by petitioner] were exceedingly broad and there was good reason to believe that they were designed to harass respondent and to compel disclosure of a large amount of confidential information pertaining to the private business of numerous other customers of respondent who were competitors of petitioner."

*Comment:* This statement is untrue. The record reveals no desire to harass respondent or to obtain any information other than that necessary to establish the actual operation of the discount system.

(17) *Quotation from Respondent's Brief, page 8:* "Counsel for petitioner said his case was closed unless the court deemed the certified questions pertinent. (R. 578.)"

*Comment:* What actually happened was that counsel was forced to close his case because the court ruled that all of the testimony which was being taken in respect to the price-system of American Can Company related to a plea which it held to be unavailable. The colloquy between court and counsel is at pages 578-579 in the record.

(18) *Quotation from Respondent's Brief, page 9:* "One of the judges who joined in this *per curiam* on the facts also filed a concurring opinion of his own, on the further ground that the pleas were not 'legally available as a defense in the state courts in a common law suit on the promissory notes involved.' "

*Comment:* The attempt is, by adding the concurring judge, to make it appear that the Florida Supreme Court ruled that all questions of fact raised by the federal plea had been disposed of below. The opinion of the concurring judge reveals the misconception created by the omission of the clause beginning with "therefore". It reads as follows (R. 621):

"Upon reconsideration of the matter I have come to the conclusion that the subject matter of the pleas is not legally available as a defense in the state courts in a common law suit on the promissory notes involved. I therefore concur in the conclusion that the judgment of the Court below should be affirmed."

Further comment on the reliability of the statement of facts in the respondent's brief is unnecessary in view of the inaccurate and misleading statements pointed out above.

**The Texture of Respondent's Argument.**

It is usual, in a reply brief, to comment on shortcomings as the argument unfolds. Here, however, the devices employed to answer, to confuse, and to avoid the issues which the case presents are so omnipresent that a detailed refutation would unduly enlarge this document. A brief comment upon the craftsmanship of the respondent, device by device, would seem to be in order.

1. An habitual resort is to question-begging, or to assuming what needs to be proved. A very few examples must serve for the extended catalogue which might be written. Thus it is stated (Res. brief, p. 12), "Petitioner's position . . . creates for it a defense . . . based on transactions which in and of themselves were strictly legal." The "in and of themselves" will be discussed below. The question at issue is, of course, the legality of the transactions in question. Again, respondent (Res. brief, p. 41) stated, "The trial court allowed all relevant evidence to be introduced." The context is concerned with the failure of the trial court to pass upon "the certified questions which various witnesses had declined to answer." Thus the relevant evidence, as respondent would have it, is that which the trial judge, after eliminating the federal question, permitted to be introduced. And again (Res. brief, p. 32), "The affirmance by the Florida Supreme Court of the judgment entered by the trial court obviously involved approval of the procedure by which the judgment had

been obtained." Thus the question at issue whether a federal right has been abrogated by that procedure is ignored.

2. A device also given full employment is letting the part do duty for the whole truth. Thus the criminal provisions of the price-discrimination section of the Robinson-Patman Act are set down (Res. brief, p. 16), but the civil provisions are not recited. And thus, it is stated that price-differences are not themselves made illegal (Res. brief, p. 9) but respondent carefully sidesteps the fundamental proposition that a presumption of illegality is set against them which it is incumbent upon them to rebut. Thus, too, $102,000 of the indebtedness is claimed to be "entirely free and clear of any taint of illegality." This is done by omitting a discussion of the dominant issue, i.e., whether the series of transactions out of which the indebtedness arose came under the operation of an illegal system of so-called quantity discount.

3. In like manner the issues are obscured by a recurring drift of the argument into irrelevant issues. Thus (Res. brief, p. 34) much is made of dates of particular sales although the record repeatedly discloses that all the transactions occurred after the Robinson-Patman Act went into effect. In general the attempt is to divert attention to questions of detail many of them irrelevant to the main issue. Thus many paragraphs are given to the relation of specific notes to concrete sales (Res. brief, pp. 36-37) and to the fairness of the prices for small cans (Res. brief, p. 35), but respondent ignored the fact that whether its system of trade practices is lawful or not is here of controlling importance. In determining this issue, it is to be noted that the record undeniably establishes that whatever were the prices quoted by the respondent for its small cans, Bruce's Juices, Inc., was denied the discount which was permitted to its larger competitors by reason of the pooling arrangement by which said large competitors were permitted to aggregate the volume of their purchases in their various plants throughout the United States. Whether

intentional or not, respondent's procedure leads to a confusion of the question which the case presents by the creation of verbal dust-storms. The following sentence—in which the fairness of the quoted price on an item takes the place of the validity of the system of discounts—must stand as representative of many to be found in the brief. "Moreover, if the giving of a higher price to one customer renders all sales to all other customers at higher prices wholly illegal, the penalty for violation would thus run many hundred-fold the amount of the discrimination." (Res. brief, p. 30.)

4. It would be tedious to protract a recitation of all these issue-evading devices. Their range is as wide as the techniques of argument. There is, however, to be noted confusion in the use of concepts. Thus "price difference" and "price discrimination" are used interchangeably. (Res. brief, p. 19.) The "summary judgment" of the circuit court for Hillsborough County is meant to mean the judgment actually rendered after the case had been stripped of the federal question and also to mean a definitive declaration of the legality of American Can Company's price structure. It is argued at one place that for American Can Company to reveal its accounts with other customers would invite a disclosure of business secrets (Res. brief, p. 41) and at another place that an inquiry into cost differences—essential to any justification of price differences—would involve a comprehensive study of the accounts of competitors which could not be safely entrusted to a state court. (Res. brief, pp. 29-30.) And repeatedly it is assumed that questions were passed upon which were left open. The irrelevant and mischievous at one stage of the argument becomes relevant at another.

Of such stuff is the texture of respondent's argument. This slight account of its techniques is necessary, because it is within such a rhetorical matrix that the substantive arguments of respondent are set.

## The Substance of Respondent's Argument.

Instead of directly meeting the issues of the case, the respondent has chosen to organize its argument around certain focal points. In general its discussions drive away from the questions before this court; in general they constitute exercises in dialectic far removed from the actualities of the market amid which processors of fruit juices must compete for trade. The sum of these oblique arguments falls short of an answer to the questions raised by the instant case. The more important of these require no more than brief notice.

1. *Specific Transactions.*—The general strategy of the respondent is to substitute a series of minor issues for the large and simple question which the case presents. To that end it is insisted that specific debts must be associated with particular transactions. In this way two advantages are sought. The first is to raise the question of what sales were made before and what sales were made after the Robinson-Patman Act went into effect. The second is to associate the debt with the sales of particular lots of cans which it is contended were used as containers for a non-competitive product. The first question will not stand up, for all the debt was incurred during the period the Robinson-Patman Act has been in effect. (R. 169, 254-255, 292, 362, 579-580). The second is an attempt to play up the small can, a matter more fully discussed under the caption below. The effect is to escape a discussion of the validity of the system of discounts set forth in the standard contracts.[3]

Throughout petitioner sets forth several and distinct forms of price discrimination, which tersely stated are:

[3] The standard contract, used with all customers of American Can Company provides that if there is one or more contracts, "the Buyer shall be entitled to one single discount upon the aggregate purchase of Sanitary Cans by Buyer under this contract and such separate contract or contracts combined."

(1) furnishing of closing equipment; (2) allowance of freight; (3) furnishing transportation; (4) selling at lower prices by means of illegal discounts; and (5) secret prices on little cans, all such discriminations being made in favor of petitioner's competitors and against petitioner. Two of these discriminations have been emphasized more than the others—(a) the illegal scheme of quantity discounts whereby the large competitors of petitioner were permitted to pool their purchases made through their various plants scattered throughout the United States and its possessions in arriving at the gross purchases upon which respondent bases its price discounts up to 5%; (b) the secret price given on the little can on sales made in Texas. The device employed by respondent is obvious, i.e., by particularization to confuse and obscure respondent's unlawful discrimination in allowance of quantity discounts.

2. *The Small-size Cans.*—The treatment of small-size cans reflects a technique prompted by the same strategy. Respondent claims that the major part of the indebtedness was incurred by petitioner in purchases of cans processed to individual requirement. It insists that, not only did these involve unusual expense, but that it sold no cans of the same size to other processors of fruit juices. Hence, since in respect to these transactions Bruce's Juices, Inc., had no competitor, there could be no discrimination. The record shows that Morgan Packing Company sold fruit juice in small cans. (R. 543.) At best the question of whether respondent did sell to others cans used to market processed fruit juices in competition with Bruce's product is a disputed matter. Brands of a particular commodity do not have to be in containers of exactly the same size to compete. And the Robinson-Patman Act specifies that the goods sold must be of a "like grade"; it does not say of an exact size. Putting then the respondent's contention in its most favorable light, it presents a question which

should be submitted to trial at law.[4] But, again, it completely ignores the larger issue of the legality of the systematic scheme of discounts running up to 5% to which the aggregate dollar value of annual sales to large customers was subject. Cans are a miscellaneous category of various sorts and sizes contrived to serve the same or different purposes. There are cans for corn, peas, asparagus, string-beans, tomatoes, pineapples, peaches and a great array of products, sold in diverse markets. (R. 213-14.) The one thing in common is that this discount, operating in disregard to type and size of product, applied to all sales of cans whether of grocery or smaller size, and regardless of what purpose for which used.

3. *The Collateral Issue.*—A variant of the same strategy is respondent's play upon the word "collateral". The attempt is made to distinguish from the instant case "the refusal" of the courts "to enforce a contract restraining trade" under the Sherman Act. (Res. brief, p. 20.) It seems to be argued that, under the Sherman Act, a contract must in itself, without reference to any other instrument reveal on its face restraint of trade to be pleadable as a defense. It is then argued that under the Robinson-Patman Act, no charge of illegality of a price system can be given where the buyer is a victim of the seller's offense. From this respondent argues that the notes resulting from the trade practices exemplified by the contract are legal. Respondent then takes the position that petitioner may not examine sales to petitioner's competitors irrespective of discounts given them because respondent claims such sales to be collateral.

For the respondent to call the restraint of trade involved here "collateral" does not make it so. Nowhere

[4] The attempt to associate specific notes with particular transactions is a call for an answer to an irrelevant question. Mr. Allison, counsel for American Can Company, in the pretrial conference stated, "The question is, was the transaction unlawful, that is the question raised by the pleas." (R. 454.)

in the list of cases cited in support[5] has the word "collateral" the meaning which respondent attempts to give it. Of course, as Mr. Justice Brandeis, quoting Mr. Justice Holmes, put it "'a person does not become an outlaw and lose all rights by doing an illegal act.'"[6] Or, in a word, if a man restrains trade, the law does not forbid him to collect his debts not touched by the restraint.

But respondent gives the word collateral a meaning quite alien to its use in the cases cited. The standard contract itself, with its classification of customers and its recitation of the schedule of discounts is—and has by the General Counsel of American Can Company been admitted to be—a *prima facie* violation of the Robinson-Patman Act—and without reference to any other document. (Pet. brief, p. 32.) The discrimination which the law condemns rests upon price differences. Therefore if discrimination by a seller against a single customer is to be shown, there must of necessity be examination into the terms of sale to other customers. For that reason the law itself compels the inquiry to go beyond the transactions between seller and complaining customer. The transactions called "collateral" by respondent—unlike those in the cases cited—are themselves an integral part of the system of price discrimination. Surely a matter cannot at one an the same time be an essential of price discrimination and yet collateral to it.

4. *The Congressional Intent.*—In this same attempt to deny under the Robinson-Patman Act a defense available under the Sherman Act, respondent's brief invokes legislative history. In support of its contention that "a de-

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[5] See *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Small Co.* v. *Lamborn Co.*, 267 U. S. 248; *Loughran* v. *Loughran*, 292 U. S. 216; *Wilder Mfg. Co.* v. *Corn Products Ref. Co.*, 236 U. S. 165; *Geddes* v. *Anaconda Copper Mining Co.*, 254 U. S. 590; *Farmers & Mechanics Nat. Bank* v. *Dearing*, 91 U. S. 29.

[6] *Loughran* v. *Loughran*, 292 U. S. 216, 228, quoting *National Bank & Loan Co.* v. *Petrie*, 189 U. S. 423, 425. Cited in Res. brief, p. 23.

fense of voidness, based on collateral Robinson-Patman Act violations" is not allowable, respondent deduces the intent of Congress from its own conception of practical business considerations. (Res. brief, p. 28.) It also insists (Res. brief, p. 25), that the legislative debates afford "no foundation for the defense interposed." Its dominant point is that the Congress did not create—it did not even consider creating—such a plea in defense as that of which petitioner has sought to avail itself. It admits the validity of such a plea under the Sherman Act, but fails to note that under it Congress did not create—or even consider creating—such a defense. The reason for the silence of Congress at the time the Robinson-Patman Act was passed—as at the time the Sherman Act was passed—is obvious. The Congress did not have to create a defense which as a matter of right was already available to the litigant. As price-discrimination is in itself and by Act of Congress a restraint of trade, the right available at common law and under the Sherman Act is accessible under the Robinson-Patman Act.[7]

5. *Burden of Proof.*—The attempted justification by respondent of its so-called quantity discounts not being based upon actual savings but rather on illegal classification of customers according to size fails to present even an issue of fact. Respondent admits that it has not and does not in this case show actual savings between sales to petitioner and its large competitors but arbitrarily classifies them according to size. Therefore, no facts could be introduced by respondent to justify such a system. However, irrespective of the above, respondent has admitted that the burden of proof rests upon it to justify the differences in price as being free of discrimination. (R. 367.)[8] Respond-

[7] See Petitioner's Brief, pp. 20-26.

[8] Mr. John M. Allison, Attorney for the plaintiff, stipulated in the course of the pre-trial conference as follows:

". . . Plaintiff concedes and offers to stipulate on the record that the Defendant, for the purposes of the pre-trial conference, has the right to rebut by competent material

ent says much about the impracticality of assessing costs against individual buyers and in favor of theoretical costs by classes of customers. Petitioner insists that the individual should not be penalized for the inefficiency of backward firms and the countryside canner as in the Ozarks (R. 508-509), which raise average costs. The question of individual as against group cost is at issue in this practice of the American Can Company. It is petitioner's contention that the Robinson-Patman Act, Section 13(a), that permits differences in price "which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered" refers to sales to particular customers and not to classes of customers. To permit classifying customers upon the basis of amount of total purchases made—size of customers, would be, as in this case, to permit the large corporations to be the favored few and the small purchaser, irrespective of how efficient his operation and irrespective of the fact that actual sales and delivery could be made to him cheaper than to a plant of a large competitor, nevertheless to be penalized. A kindred issue is the allocation of overhead among the several classes of customers. Here the most tangible standard upon which respondent falls back is "the practice" of the American Can Company. (R. 243). It is submitted that the practice of respondent's company cannot at one and the same time be the issue in this case and the standard by which that issue is to be resolved.

Respondent insists that its scheme of cost accountancy, intended to confer the blessing of the law upon its trade

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and relevant testimony, if any it has, the evidence heretofore adduced by the Plaintiff, as *prima facie* justification for quality [quantity] discounts, which Plaintiff admits it allows to its purchasers of Packers cans, under the terms, conditions and provisions set forth in its contracts, . . ."

practices, is of a kind with a cost study which compared the costs of selling Sears, Roebuck and Company with the *average* of the cost of selling to the independent tire dealers.[9] An analysis of that intricate case cannot be attempted here. It is enough to say that it came up under the Clayton, not under the Robinson-Patman, Act; that the two parties to the case had each its own system of cost accountancy, and that the perplexities of that matter exhibited defects in respect to the burden of proof which it was the very purpose of the Robinson-Patman Act to correct. There costs alleged in justification were subjected to critical scrutiny; here hypothetics have had to do duty for the original records which were available, but which the respondent failed to produce. (R. 231-233.)[10] It is enough that the court refused to consider the evidence, to rule on objections to exhibits, to take up questions certified. (R. 455-458.)[11]

6. *Credit and Consequences.*—Respondent argues at some length the dire consequences which would attend a decision

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[9] *Matter of Goodyear Tire and Rubber Co.*, 22 F. T. C. 232; *Goodyear Tire and Rubber Co.* v. *F. T. C.*, 92 F. (2d) 677, 304 U. S. 257; 101 F. (2d) 620; cert. den. 308 U. S. 557.

[10] It is not without significance that when the American Can Company wired "the eight competitors" of Bruce's Juices, Inc., the small companies replied that they were willing to have the records of their dealings with respondent put in evidence and the large companies that they were not. (R. 216-218).

[11] The judge's attitude, with its overtones of fear against getting into deep water, bears eloquent witness to the failure of the pre-trial conference to reach legal conclusions upon "the facts submitted in evidence." The trial judge remarked, "This question is not one that ought to be before this court as I have had occasion to remark but it ought to have been before the Federal Trade Commission on the question of whether or not this system that is set up here is legal under the Robinson-Patman Act. It hasn't got any business in this Court because we have not the facilities to investigate all those things . . ." (R. 578).

in petitioner's favor.[12] The chief argument is that an allowance of the defense sought would impair the capacity of the small processor to obtain credit and would lead to the depreciation of the resulting commercial paper. (Res. brief, pp. 28 ff.) The answer is, of course, that any problem of the inability of the small manufacturer to secure ready access to necessary credit should be attacked at its source. If credit is not available, or commercial paper is subject to discount, the reason is the legal jeopardy in which the transactions out of which they emerge stand. That jeopardy is most easily removed by the seller obeying the law and accommodating his price system to the standards of the Robinson-Patman Act. If discrimination is removed, with it will go the competitive disadvantage attending the power of such concerns as American Can Company to impose upon small business the squeeze play which narrows the margin between price and costs. Once such a discrimination is ended, the little fellow becomes a better credit risk.

A like critical attack is invited by a number of other aspects of the argument.

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[12] A footnote is thrown up against petitioner's argument on the concentration of wealth. (Res. brief, footnote 20, p. 39.) The matter presented is subject to challenge for two reasons: first, it does not go back of the facts of nominal ownership, and, second, it indulges a *post hoc, propter hoc*. But, waiving these objections, the figures recited run counter to respondent's contention. For in the period covered, from 1936 to 1939, the number of canners increased 15%; the number of canners of grapefruit juice increased 36%; and the "pack" of grapefruit juice increased 205%. Figures are given for canners of orange juice, but not for the size of the pack. So that comparison cannot be made. Thus, so far as the matter is disclosed, there is a strong trend towards concentration.

## CONCLUSION.

We believe that the most convincing conclusion of this reply brief can be made by summarizing respondent's argument.

Respondent's argument is divided into two parts. The first contends that a violation of the Robinson-Patman Act by the seller does not remove the obligation to pay for the goods received by petitioner. The second part argues in the alternative that the incomplete pre-trial conference offered a sufficient basis for a summary judgment on the issues of fact raised by petitioner's defense of illegality.

The logic of the first part of the argument is difficult to spell out. It seems to run as follows: The Act does not outlaw price differences. (Respondent ignores the fact that the Act makes them *prima facie* illegal.) Illegality of a price contract with one individual therefore cannot be determined without examining contracts with others. This, argues respondent, cannot be done because the contracts with others are "collateral" and the terms thereof inadmissible to prove illegality. No single transaction which is part of an illegal price scheme is illegal in itself. It is only the relationship between the sales that is unlawful. The result, they contend, is that a seller may engage in a course of selling which is illegal as a whole and at the same time enforce as a valid obligation each separate transaction used to carry out the illegal purpose. Respondent concludes that it is, therefore, the duty of the state court to split the illegal price scheme into separate transactions each of which standing alone is legal and thus to enforce piece-meal its unlawful purpose.[13]

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[13] In a word the argument is that the pulverization of an illegal course of conduct into its several parts is a penetential procedure which confers immunity to the law. In the instant case this idea appears for the first time on appeal to this Court. At the pre-trial conference respondent's counsel admitted over and over again that the statute put on it the burden of proof in this particular case to justify the price differences between petitioner and its competitors. (R. 367.)

Respondent adds a refinement to this argument apparently for the purpose of driving a sharp line between the Sherman and the Robinson-Patman Acts and for the purpose of distinguishing cases which run against respondent's contention.[14] According to opposing counsel this refinement consists of the assertion that if the buyer and seller were in *pari delicto*,—if they were both engaged in a conspiracy to victimize a third party in violation of the Act—in such a case the buyer would have a defense of illegality.[15] They make the amazing assertion that the defense of an illegal price discrimination is not available to the victim. His innocence takes away his federal right by making it impossible to prove illegality without going into collateral transactions. Such a result is on its face, pure nonsense. It is repudiated in principle by the case of *Continental Wall Paper Company* v. *Louis Voight & Sons Company*, 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486, and is categorically repudiated in the first opinion of the Florida Supreme Court in this case.[16]

Respondent suggests but two reasons why Congress would have intended consequences which are so contradic-

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[14] Respondent seems to have missed the point in Walton Hamilton, "Cost as a Standard for Price," 4 Law & Contemp. Problems 323. The author's contention is that cost accountancy is too uncertain and its techniques too receptive to arbitrary judgment to serve as a standard upon which a judgment between the lawful and the unlawful can be safely rested. Overlooking this, the respondent cites the article in support of the proposition that "a sound policy . . . cannot be achieved by the widely dispersed federal and state courts." (Res. brief, p. 27).

[15] In a word a defense is not allowable under the Robinson-Patman Act, which as a conspiracy of buyer and seller against another buyer, is not allowable under the Sherman Act. The range of restraint, as outlawed by the Sherman Act, is not so narrowly limited as is contended here. Nor is petitioner willing to admit that the discrimination which it pleads is not a violation of the Sherman Act. The would-be rule of law seems to be a creation by respondent for the very purpose of insuring its own legal immunity.

[16] (R. 599).

tory to the purpose of the Robinson-Patman Act. The first is that to allow the victim of an unlawful price scheme a defense would impair our national credit structure. The second is that it would force unspecialized state courts to decide whether price differences were justified under the Act. Congress, asserts the respondent in a question-begging conclusion, had no intention to give to untutored state courts power to decide such questions.

The second part of respondent's argument is based on the unargued premise that the incomplete pre-trial conference was actually a trial of the issues of illegality adequate to protect petitioner's federal right. The only reason given in respondent's brief for such an interpretation of the pre-trial is their assertion that such procedure was in accord with settled Florida practice.

The incorrectness of this assertion is made evident from a brief examination of the Florida rules themselves. They are designed, as is usually the case with pre-trial conference rules, to simplify the issues. And at the pre-trial conference before us one issue at least was made clear and simple. The burden of proof was admitted to rest on the respondent to justify the price differences shown by the record. Respondent expressly stipulated that this issue was before the court. That issue has never been tried according to Florida procedure. However, whether this summary judgment is in accord with Florida rules is immaterial where a federal right is involved.

It can hardly be argued that a hearing at which petitioner was deprived of the right to cross-examine witnesses and to produce as relevant evidence respondent's accounts with petitioner's competitors to sustain its pleas is a trial of the issues raised by its pleas adequate to protect its Federal right. Nor can it be argued that respondent met its admitted burden of proof to justify its admitted price differences when it refused to submit its relevant accounts in evidence. Respondent does not attempt to so argue. Instead its brief obscures the character of the trial by state-

ments intended to give the misleading impression that petitioner in the trial below had every opportunity to complete its testimony and refused to do so.

As Mr. Justice Stone recently said in *Sola Electric Co. v. Jefferson Electric Co.*, 317 U. S. 173, 176, 63 Sup. Ct. 172, 173-174:

> "It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules. In such a case our decision is not controlled by Erie Railroad *v.* Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487. There we followed state law because it was the law to be applied in the federal courts. But the doctrine of that case is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law . . . When a federal statute condemns an act as unlawful the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield . . ."

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IN THE

# Supreme Court of the United States

October Term, 1948

No. 27.

Bruce's Juices, Inc., a Corporation, *Petitioner*,

v.

American Can Company, a Corporation, *Respondent*.

On Certiorari to the Supreme Court of the State of Florida.

REPLY TO RESPONDENT'S SUPPLEMENTARY BRIEF OF BRUCE'S JUICES, INC., PETITIONER.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946

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No. 27.

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BRUCE'S JUICES, INC., a Corporation, *Petitioner,*

v.

AMERICAN CAN COMPANY, a Corporation, *Respondent.*

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**On Certiorari to the Supreme Court of the State of Florida.**

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## REPLY TO RESPONDENT'S SUPPLEMENTARY BRIEF BY BRUCE'S JUICES, INC., PETITIONER.

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*To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.*

Respondent, American Can, has just filed with this Court "a supplementary brief." This document, instead of being an addendum to, is a restatement of, its previous argument. In general the position taken and the propositions advanced are those which were put forward at the last term. The only material departures are that the revised

argument strays ever further from the case which was argued in the Florida courts, and that reliance is now placed far less upon the law and more upon public policy than before. This reply brief, accordingly, is limited to a consideration of these revised lines of argument. The infirmities of the general argument put forward by American Can have been pointed out in our Reply Brief, and respondent's supplementary brief does nothing to cure or to correct them.

## ILLEGALITY IS DIRECT NOT COLLATERAL.

In the course of this litigation American Can has repeatedly attempted to draw a wedge between the Sherman and the Robinson-Patman Acts. It has thus sought to make a plea allowable under the former, inadmissible under the latter. In this attempt it has put forward—and has abandoned—a number of distinct arguments. The trial court attempted to distinguish between *malum in se* and *malum prohibita*.[1] At the hearing a year ago, it was argued by American Can that the Robinson-Patman Act creates new rights and that the remedies set forth in the statute against the offenses enumerated are exclusive. It is now argued that, whereas under the Sherman Act, illegality may reside in a single transaction, it takes two transactions to demonstrate the "discrimination" condemned by the Robinson-Patman Act; and, since the court can look only into the contract between the parties to the suit, the breach of the law is beyond judicial recognition.

No such attempt to drive a wedge between the acts has validity. The antitrust laws have through a long record of interpretation been treated as an entity by this Court. The practices outlawed by the Sherman, the Clayton, and the Robinson-Patman Act all lessen, or tend to lessen, competition and to promote monopoly. The legislative history reveals a constant endeavor of Congress to strengthen the

[1] It is of interest that Sir William Blackstone makes much of such a distinction and that Jeremy Bentham riddles it.

bans on restraint, to add new remedies, to reduce general to specific prohibitions. The Robinson-Patman Act creates no new offense; it specifies forms of restraint which have become serious hazards to the operation of a system of private enterprise. The Congress, in creating new public remedies did not take away any remedy heretofore available to the private party who was injured. An attempt to distinguish in orbit or character between the Sherman and the Robinson-Patman Acts is now played down by American Can, if not abandoned. The latest attempt of respondent is to argue that a challenge of its price-system-in-operation involves a "collateral", and not a "direct", attack.

In its supplementary brief American Can labors to separate the two acts. It is a course of conduct, a price system in operation, a series of transactions with which this case is concerned. American Can attempts to avoid adverse judgment by breaking down its system of price discrimination into separate acts and insulating each from every one of the others. Each in itself and in vacuo is imminent; and since no two can be compared or related—even though the Robinson-Patman Act commands such comparison and relation—there is no available procedure by which it can be judicially condemned.

Thus respondent argues that if a sale had been made to Bruce's Juices on Monday, followed by a separate sale on Friday to a competitor at a lower price, the second sale would not make the first sale illegal. This argument is apparently based on the theory that such sales are entirely separate, and the discrimination in the second sale would not make the first sale retroactively void.[2] We need not

[2] This graphic illustration will not stand analysis. Respondent presents the vendor selling a bill of goods to A on Monday for $100, an equivalent to B on Wednesday for $100, and the like to C on Friday for $90. It is then asked whether the transaction on Friday taints with illegality the transactions consummated on Monday and Wednesday. It is the manner in which the discount is made which creates the illegality. The order in which the sales

discuss this question because it is not in issue here. The pleas of Bruce's Juices do not set forth any such situation. Instead, they charge that American Can deliberately and intentionally followed a scheme and plan to allow the competitors whom it has named in its pleas a discriminatory discount. The sales to Bruce's Juices are charged inseparable from that scheme as it was formulated and carried out. (R. 41-47). They cannot be considered as separate transactions because they were not separate transactions. They were the instruments by which an illegal price policy covering Bruce's Juices and its named competitors was put into effect.

We submit that it is impossible to say that the separate steps, through which a deliberately planned illegal price policy is made effective, are separate and distinct from that illegal price policy.

The Federal question presented here is extremely simple. Bruce's Juices claims that when it is sued in the state court on a transaction which is part of an illegal scheme which discriminates against it, it may plead as a defense the carrying out of the illegal scheme or plan. Certainly this would be true if the transaction were part of a larger plan to violate the Sherman Act. It must be equally true if the

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were made has nothing to do with it. The illustration, however, even on its own unrealistic hypothesis will not stand up; for if the transaction with C is shifted to Monday and that with A and B to Wednesday and Friday, or if the transactions with A, B, and C are continuous, the whole affair takes on a different legal hue. In a retreat, respondent, by giving priority to the transaction at the higher price proclaims its innocence and then insists that it is only the subsequent transaction at the lower price which is discriminatory; but since the person who is its victim is not a party to it, the second contract is subject, not to his "collateral" attack, but only to challenge by the party who enjoys its benefits. (Res. Supp. Br. pp. 8-9). In a word respondent says a contract willfully made to the detriment of a third party is not open to attack by any one who has an interest in challenging it; and the law must in practice operate to the injury of the very party it was meant to serve.

transaction is part of a larger scheme to violate the Robinson-Patman Act. We can see no difference in legal result whether the transaction is part of an attempt to violate the one act or the other.

In respondent's original and supplementary briefs alike much is made of the word "collateral". American Can reiterates that where illegality is not inherent in the transaction the transaction cannot be attacked as unlawful. We agree and have no complaint against the cases cited. They have, however, no application here.

We stand on the proposition that a transaction which is part of the effectuation of an illegal scheme is inherently unlawful. We assert that it is absurd to say that the means used to carry out an illegal plan can be treated as collateral and separate and apart from that plan.

**The "Rule" of the Wilder Case.**

American Can in support of its "collateral" argument puts its reliance in *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, 35 S. Ct. 398 (1915), and its derivative cases. These cases bear undisputed testimony to the existence of a rule against collateral attack. No one of them gives any support to the contention that the plea sought to be interposed by your petitioner involves a collateral, rather than a direct, attack.

The rule invoked by respondent was articulated in the *Wilder* case. There a person who had been sued for debt sought as a defense to plead the illegal existence of the creditor corporation. The Supreme Court, in an opinion by Mr. Chief Justice White, refused to allow the plea. It held that "the rule of general law . . . does not permit the existence of a corporation to be indirectly attacked"; and, since "it is not asserted that, irrespective of the illegal existence of the corporation, the contract of sale was inherently unlawful", it refused to entertain the plea. But the Court was careful not to impair the authority or to re-

strict the orbit of the *Connolly* and the *Continental Wall Paper* cases,[3] which are in point in the pending action. In the instant case, there is no "collateral" attack. Bruce's Juices does not seek to question the legality of the corporate existence of American Can. On the contrary its challenge is direct; it insists that invalidity is inherent in the series of transactions by which the company has discriminated in price to the detriment of Bruce's Juices and to the advantage of its larger competors.

Nor is authority to be found for calling the attack Bruce's Juices is making "collateral" in any decision of this Court in which the *Wilder* case is cited.[4] In *U. S.* v. *Babcock*, 250 U. S. 328, 331, 39 S. Ct. 464, 465 (1919), the *Wilder* case is cited only for the proposition that "where a statute creates a right and provides a special remedy, that remedy is exclusive". The instant case presents no such issue. In *Geddes* v. *Anaconda Copper Mining Co.*, 254 U. S. 590, 593, 41 S. Ct. 209, 210, (1921) it is cited as holding that "the remedies provided by the Anti-Trust Act of 1890 . . . are exclusive". The case involves no question at issue here. In *General Investment Co.* v. *Lake Shore & M. S. Ry. Co.*, 260 U. S. 261, 286, 43 S. Ct. 106, 117, (1922), its use is to support a holding that a suit by private persons for an injunction under the Sherman Act must be brought in a federal, not a state, court. There is no relevancy to the instant case. In *A. B. Small Co.* v. *Lamborn & Co.*, 267 U. S. 248, 252, 45 S. Ct. 300, 302 (1925), it is cited as holding that a contract collateral to that in restraint of trade is not illegal and that the law condemns "only where the validity is inherent in the contract". The rule on collateral attack is here reasserted; but it gives no support to calling "collateral" a contract between the respondent and another

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[3] *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 22 S. Ct. 431 (1902); *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U. S. 227, 29 S. Ct. 280 (1909).

[4] *Paine Lumber Co.* v. *Neal*, 244 U. S. 459, 37 S. Ct. 718, 723 (1917), hardly needs to be listed, since the *Wilder* case is there cited in a dissenting opinion as "not in point".

party which is the very instrument of price discrimination. In *F. T. C.* v. *Western Meat Co.*, 272 U. S. 554, 559, 47 S. Ct. 175, 177 (1926), the *Wilder* case is plead by counsel seeking a narrow construction of the agency's power. Mr. Justice McReynolds for the Court refuses to allow it to stand in the way of reading the statute "in the light of its general purpose". In *Paramount Famous Lasky Corp.* v. *U. S.*, 282 U. S. 30, 42, 51 S. Ct. 42, 45 (1930), dicta are quoted from the *Wilder* case to the effect that the antitrust laws were "founded upon broad conceptions of public policy" and that "the remedies . . . provided were coextensive with such conceptions". In *U. S.* v. *Cooper Corporation*, 312 U. S. 600, 604, 61 S. Ct. 742, 743 (1941), the *Wilder* opinion is quoted to the effect that the "Sherman Act . . . created new rights and remedies which are available only to those on whom they are conferred by the Act." In *Switchmen's Union of North America* v. *Nat. Mediation Board*, 320 U. S. 297, 301, 64 S. Ct. 95, 97 (1943), it is cited to support the statement that "Congress . . . selected the precise machinery and fashioned the tool which it deemed suitable to that end . . . In such a case the specification of one remedy normally excludes another". The issue before the Court was judicial review of the findings of the National Labor Relations Board; the case was in no wise concerned with the antitrust laws. In *Loughran* v. *Loughran*, 292 U. S. 216, 228, 54 S. Ct. 684, 689 (1934), upon which respondent relies heavily, the *Wilder* case is not even cited. Mr. Justice Brandeis there says, "it is settled that illegality constitutes no defense when merely collateral to the cause of action sued on". He goes on to quote Mr. Justice Holmes to the effect that a "person does not become an outlaw and lose all rights by doing an illegal act". In the instant case there is no question of American Can "becoming an outlaw and losing all rights". In none of these cases is the language quoted open to serious dispute; in none of them is the language quoted relevant to the issue in this litigation. None of these cases supply any sanction for an exception of the general and established rule that the

distinction between the "inherent" and the "collateral" must turn upon relevancy to the issue with which the court is concerned. The issue, quite specific, is not met by the general assertion of respondent that a collateral attack is not to be made; the need is to show that the attack made is collateral.

It is from these citations impossible to discover the doctrine of the *Wilder* case. As the catalogue above indicates, its use is to support a miscellany of statements. Even where cited, it is usually for a purpose other than to invoke the rule against the collateral attack. The case has been cited by this Court only in the instances mentioned and only to support the statements enumerated above. In no single instance has its employment had anything to do with any issue raised by the Robinson-Patman Act. It nowhere gives support to respondent's proposition that in attacking price discrimination as illegal, Bruce's Juices is making a collateral attack.

## CREDIT AND THE APPEAL TO POLICY.

An escape from the weakness of American Can's legal position is sought in an appeal to public policy. This Court is urged to overlook the illegality of respondent's price-system lest serious economic consequences ensue. Its judgment must be stayed by "the practical commercial effects" any adverse rule would have. No evidence of disastrous effects is offered; instead a speculative "parade of horrors," quite barren of any supporting data, is set down. (Res. Supp. Br. especially 22-27, 37). It is reiterated that any seller using a quantity discount system could not collect; that cost and complexity would attend the collection of a debt; that all who owe such sellers would be well advised to withhold payment; that the incidence of the ban would fall most heavily upon the little fellow; that the obvious way to meet such a judicial decision would be for the manufacturer not to extend credit. Such statements can be read as a threat of a strike by American Can against its smaller customers if this case is decided against it.

The obvious answer is that the law-abiding corporation has nothing to fear for itself or for its customers. If the same price is made to all alike, there cannot even be a charge of discrimination. If a genuine system of quantity discount is set forth, the seller called upon to justify it has only to present data showing it is firmly established on cost-differences. It is only when the seller sets up an arbitrary system of quantity discount; or when quantity discount is used to mask some other discriminatory practice, such as an arbitrary classification of customers, as in this case, that any legal hazard appears.

Accordingly, the dire consequences threatened by respondent are not inevitable or even probable. If the allowance of the plea sought to be interposed by Bruce's Juices should possibly add complexity and cost to the collection of a debt, the seller can avoid the bother and expense by bringing his price-system into accord with the law's mandate. As the Clayton Act is rewritten by the Robinson-Patman Act, a presumption of illegality is at present set against differences in price to competing customers. And a seller who makes different prices to customers in competition now proceeds at his peril of having to demonstrate in court that the difference is justified by a difference in the cost of manufacture, selling or delivery. In setting up any scheme which favors certain customers at the expense of others, he now assumes an arduous burden of proof. The Congress has taken pains to place serious legal hazards in the way of a departure from the rule of equality; and the seller is well advised to guard his price-structure against the charge of discrimination. The "complexity and expense" of collecting debts which arise out of a series of illegal transactions may well induce the seller to bring his price practices into accord with the law. If he does, the hazard will be removed and no obstacle will stand in the way of his generous extension of credit.

But forces are at hand which, if allowed full play, will capitalize a decision against American Can into a healthier extension of credit. An extension of credit is hardly a

quid pro quo to the customer who must remain a victim of price discrimination. Here the rationale of the Robinson-Patman Act is compelling. Processors of fruit juices must sell in competition at prices made by all the forces which converge in the market. The profit—even the chance of survival—of each of them depends upon the margin between expense and price. The supplier of a producer's good, such as tin containers, by his practice of discrimination, can widen for the favored and narrow for the unfavored this margin between expense and price. The victim of such a "squeeze play" will derive little consolation from the availability of credit in order that he may sit in on a game in which the cards have been stacked in favor of the large corporation with which he must compete. And, when he is driven to the wall, the availability of credit will do him no good.

A famine of credit cannot persist if competition prevails in the industry. Even now a way of escape is open to the smaller processor of fruit juices. He can transfer his patronage from American Can to a smaller manufacturer of tin containers. The stubborn insistence of the giant concern upon going its lawless way will, in fact, provide a business incentive to its smaller competitor to stay within the law. The law-abiding concern, bent upon enlarging its operations, can extend credit without fear of a legal hazard in collection. American Can, then, must follow along the road of living within the law or risk the loss of a large part of its business. Respondent seems to forget that business executives are concerned to serve their own advantage.

Thus in the end the case for American Can comes down to an argument of convenience. Injustice must be tolerated lest a large corporation be forced to mend its ways. The enduring basis upon which sound credit rests is the solvent and expanding operations of the businesses which employ it. Credit has not rested—and does not now rest—upon the immunity of the creditor to the law of the land.

The whole argument on economic policy is based on another assumption which we do not believe can be sus-

tained. The idea appears to be that the Robinson-Patman Act is a difficult and complicated statute and that business men may, in good faith and without a deliberate intention to violate the Act, make a contract which involves discriminatory prices. In that case, counsel for American Can appears to assume that the seller must give away his goods.

Let us assume that a seller brings suit stating that it believes in good faith that the contract prices of the goods are non-discriminatory but that in any event it has no desire to collect prices which the court holds to be discriminatory. Under these circumstances, it submits itself to the jurisdiction of the court and is willing to accept whatever prices, either on a quantum merit or a contract basis, are free from any taint of illegality. It is inconceivable that in such a situation the buyer could say that because the seller made a mistake in good faith it could recover nothing.

This is not the position of American Can here. Its contention is that it may sue for a price which is prima facie discriminatory and deprive the buyer even of the opportunity to prove its case.

## ARGUMENT v. ADMISSIONS OF COUNSEL.

In the pre-trial conference in the Circuit Court of Hillsborough County, Florida, the General Counsel of the American Can Company testified that when the Robinson-Patman Act became a law the corporation realized that the discounts which it was giving were in violation of the Act, and the officers of the company set out to devise a system of quantity discounts which could be sustained by proof. They divided its customers into three classes—the largest, Class A, were to receive 5% discount; the second group, Class B, were to receive discounts from 1% to 5%; the third group, Class C, which included all those who purchased less than $500,000 annually, were to receive no discount. He further testified that the actual cost of selling and serving individual purchasers was not considered relevant and that no purchaser through his own

efficiency could escape from the class to which he had been assigned by American Can.

He admitted that this scheme of discounts was prima facie illegal, and that American Can was under obligation to justify it by showing differences in costs under the standards set by the Robinson-Patman Act. (R. 571-578). This is all that petitioner is asking the American Can to do in this case. It is apparently what they expected to do when they devised their plan.

But American Can now takes the position that it is under no obligation to justify its price discount. It claims that it can collect on every contract which is part of its plan without any necessity of rebutting the prima facie illegality of that plan. It asserts that all Bruce's Juices can do is to bring suit for triple damages after it is paid the prices which are the essence of its discriminatory scheme.

But, as we have pointed out in our original brief, a suit for triple damages is a protection only in the unusual case. A canner gradually forced out of business may be unable to show that it might have made a success if it had not been discriminated against. The purpose of the Robinson-Patman Act is to give independent business a chance to succeed.

## CONCLUSION.

Finally we point out the economic consequences of permitting American Can to enforce an illegal scheme of price discounts by suing on the particular transactions which are the instruments by which the plan is carried out. This means that every other can company who desires to get the business of the national brands in competition with American Can must give them equivalent discounts. Thus the plan of discounts will inevitably spread. It may be that the costs of enforcing the illegal scheme of discounts may include the settlement of an occasional triple damage suit. But this is a small price to pay for the establishment of a monopoly. The Court may take judicial note that many another monopoly has grown up by this very process, i. e.,

the continued and constant elimination of independents at the price of an occasional triple damage recovery.

The other arguments in the respondent's supplementary brief we think are sufficiently covered in our original brief and in our reply. We only point out here that the respondent's supplementary brief again makes the assumption that there was a trial in the State Court and that at that trial petitioner did not produce sufficient evidence to sustain its defense. Our answer to this does not require restatement. There was no trial. This was not the purpose of the uncompleted testimony taken (R. 37-39), or the basis of the judgment as ordered by the trial Court, (R. 580-582), nor as particularly pointed out in the opinion of the Supreme Court of Florida (R. 594-601, and particularly at p. 600 thereof). The Court there held the defense of illegality unavailable in this litigation, and therefore did not permit petitioner to develop its evidence. If this truncated and incomplete proceeding is to be treated as a trial by the Supreme Court of Florida that in itself deprives us of our defense under the Robinson-Patman Act. Petitioner stands upon its original brief and reply brief as supplemented hereby.

Respectfully submitted,

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IN THE

# Supreme Court of the United States.

October Term, 1945.

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BRUCE'S JUICES, INC., *Petitioner*,

v.

AMERICAN CAN COMPANY.

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**On Petition for a Writ of Certiorari to the Supreme Court of the State of Florida.**

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## BRIEF FOR RESPONDENT IN OPPOSITION.

---

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IN THE

# Supreme Court of the United States

October Term, 1945.

No. 402.

BRUCE'S JUICES, INC., *Petitioner*,

v.

AMERICAN CAN COMPANY.

**On Petition for a Writ of Certiorari to the Supreme Court of the State of Florida.**

## BRIEF FOR RESPONDENT IN OPPOSITION.

### OPINIONS BELOW.

The Circuit Court of Hillsborough County did not write an opinion. Its findings of fact and conclusions of law appear at R. 580-582. The opinions of the Florida Supreme Court on hearing and rehearing appear at R. 594-601, 621.

### JURISDICTION.

There is no judgment order of the Florida Supreme Court appearing in the Record. Nor does petitioner's Designation (R. 623) contain directions to the clerk of the court below to include such an order in the Record. This jurisdictional defect is noted *infra*. The petition for a writ of cer-

tiorari was filed on September 5, 1945. The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code.

## QUESTION PRESENTED.

Whether the evidence presented to the trial court, before both sides voluntarily rested, of alleged Robinson-Patman Act violations by respondent was sufficient under state practice to require submission of the case to a jury.

## STATUTE INVOLVED.

The Robinson-Patman Act provides in Section 2(a) (15 U. S. C. § 13):

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price *between different purchasers of commodities of like grade and quality,* where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered* . . . And provided further, that nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade . . ." (Italics supplied.)

Section 3 of the Act (15 U. S. C. § 13a.) likewise makes it unlawful knowingly to discriminate against competitors of a purchaser by giving to the purchaser a discount, rebate or allowance which is not made available to the competitors in sales of goods of like grade, quality, and quantity. The scope of Section 3 is more limited than that of the first section of the Robinson-Patman Act, and a quantity discount which might be obnoxious under that section would not be a penal offense under Section 3.

## STATEMENT

The American Can Company, respondent, manufactures in normal times approximately three hundred styles and sizes of packers' tin cans, of which five are standard sizes widely used (R. 545). It has a number of plants throughout the country, including one in Tampa, Florida, where petitioner packs fruit and vegetable juices. The respondent's factory in Tampa is equipped to manufacture several, but not all, the different can sizes. Petitioner purchased large cans from respondent and in addition, in 1936-1937, started experimenting with cans of small sizes holding an individual serving of juice which it planned to sell to stores handling soft drinks (R. 378). It tried out cans holding 5½ and 5¾ ounces (R. 379). In the fall of 1938, petitioner decided to standardize on a 6-ounce can which would permit competition with Coca Cola and other 6-ounce soft drinks (R. 382, 547). The can was sometimes supplied petitioner by respondent from Baltimore with freight equalized to Tampa, *i.e.*, absorbed by respondent to that point. Respondent installed a special manufacturing line in its Tampa factory to make the 6-ounce can, at a cost of approximately $100,000.00 (R. 547).

Petitioner became a customer of respondent in or about 1928 and its purchases of cans now in suit extended over a period from 1936 to 1941 (R. 169; 377). Some were open account purchases and others involved interest bearing notes. In 1942 the remaining indebtedness was entirely rep-

resented by renewal notes in excess of $100,000.00 (R. 579, 580). Suit was instituted by respondent in the state Circuit Court on July 23, 1942. On October 2, 1942, petitioner brought suit in the United States District Court for treble damages, pursuant to 15 U. S. C. § 15, authorizing such suit in federal courts for violations of the Robinson-Patman Act resulting in injury to the claimant (R. 501). On October 5th petitioner filed its pleas in the state court suit.

The pleas, though general, set up five defenses. One defense was that the renewal notes had been given conditionally—on condition that adjustments be made on the amount due—and that since the adjustments had not been made, payment was not due and the notes were void. This was abandoned in the Florida Supreme Court (R. 600).

The other four defenses were based on alleged illegal discriminations by respondent against petitioner in violation of the Robinson-Patman Act. It was charged that these rendered the notes void. The petitioner claimed, first, that other canners were charged lower prices for cans of substantially the same grade. Second, respondent was accused of furnishing equipment for closing cans without charge to competitors, while charging petitioner for such machinery. No effort to prove this charge was ever made and it was apparently abandoned until revived in the petition. Third, it was alleged that illegal discounts were granted other customers. Fourth, it was contended that for the purpose of destroying respondent's competition cans were sold in Texas for a lower price than that charged petitioner in Florida.

The respondent demurred to the pleadings and also moved to strike or in the alternative compel amendment.

Pursuant to Florida law, the trial judge ordered a pretrial conference, in part to simplify the issues and to avoid unnecessary proof by securing admissions (R. 57-58). In addition he ordered the parties to present their witnesses and evidence in support of their pleadings (R. 58). He authorized depositions to be taken where necessary. The purpose of this procedure was declared to be "to *simplify and deter-*

*mine* the issues between the parties, and for the purposes hereinabove set forth." (R. 58).

Under Florida practice each party understood that if it failed to show that enough evidence could be produced to require submission to a jury, the law suit might be terminated. The parties therefore proceeded to take evidence before the trial judge, by deposition in New York City, and again in Tampa before the trial judge. Five hundred and twenty printed pages of testimony and exhibits were accumulated. In addition, a great many other voluminous exhibits were received in evidence. These should have been printed but were omitted by inadvertence on the part of the court below and have now been filed with the Clerk of this Court. They form as important a part of the Record as that which has been printed.

During the taking of testimony in New York, certain questions asked witnesses were temporarily not answered and certified to the trial court for ruling on questions of relevancy and propriety. There was ample opportunity available to secure these rulings.

After the case had been fully explored, the trial judge asked if either side wanted to take any further testimony or "if both sides are closed: both sides" (R. 578). Counsel for petitioner said his case was closed unless the court deemed the certified questions pertinent (R. 578).

Subsequently, the trial court entered findings of fact and conclusions of law (R. 580-582). First, it found that the evidence showed execution and delivery of the notes in the specified amount. Second, it found that the evidence failed to disclose a conditional delivery. The evidence offered by petitioner was held to have fallen "far short" of showing that plaintiff ever agreed to an adjustment. Finally, the defense of illegality of consideration was held unavailable since the federal law was deemed to prescribe the exclusive remedies to persons affected by violation of the Robinson-Patman Act.

On appeal by petitioner the Florida Supreme Court, by a 5-2 vote, reversed the judgment below, holding that the defense of illegality could be interposed in the state court. Respondent petitioned for a rehearing, asserting that the court had erred as to the law. Respondent also asked the Florida Supreme Court in the alternative to examine the evidence and affirm the judgment on what the record disclosed. (See R. 616.) Rehearing was granted and argument and briefs were submitted. After this rehearing the Florida Supreme Court filed a *per curiam* opinion in which four of the seven judges joined, stating:

> "We are of the opinion that the defense attempted to be interposed was not available under the facts submitted in evidence to the court below and, therefore, the judgment should be affirmed." (R. 621).

One of the judges who joined in this *per curiam* on the facts also filed a concurring opinion of his own, on the further ground that the pleas were not "legally available as a defense in the state courts in a common law suit on the promissory notes involved."

Petitioner's application for a second rehearing was subsequently denied (R. 622).

## ARGUMENT.

### Introductory.

The questions actually presented on certiorari by the Record are of narrower compass than the petition would seem to indicate. Petitioner has employed two erroneous premises to obscure the true issues.

The first is that the final *per curiam* opinion of the court below decided that in Florida the defense of illegality under the Robinson-Patman Act would not be allowed. Thus petitioner seeks to create a federal question which it urges is

of great public importance and requires review by this Court.[1]

Respondent's petition for rehearing had urged the Florida Supreme Court to examine the evidence and affirm the judgment on the basis of what the record disclosed. The trial court had passed on the evidence on the contested issue of conditional delivery, subsequently waived by petitioner in the Florida Supreme Court. It had heard the evidence on the question of illegality under the Robinson-Patman Act but had finally rested its decision on the ground that the defense was unavailable in the state court suit. Under Florida practice the Florida Supreme Court examined the record on the facts to ascertain whether it was necessary to submit to a jury the issues raised by petitioner.

The *per curiam* opinion makes it clear that the court below passed on the voluminous evidence much as a federal court would do in entering summary judgment on the basis of affidavits, depositions, or interrogatories. That the court below did not pass on the question of whether collateral Robinson-Patman Act violations wiped out all liability on indebtedness to the violator is clear from the concurring opinion which otherwise would not have been written. The concurring judge agreed on the facts and offered the additional ground that the defense was not legally available in the state court suit. In short, the Florida Supreme Court has followed the salutary practice of not deciding an issue of law hypothetically.[2] It did not decide, as petitioner asserts, that the defense of illegality was unavailable as a matter of law.

[1] Petitioner likewise asserts that only three of the four affirming judges joined in the *per curiam* opinion. The Record discloses that four joined in the opinion of the court (R. 621). That opinion stated that the defense was unavailable "under the facts submitted in evidence to the court below."

[2] If certiorari is granted, the respondent reserves the right to seek affirmance on the alternative basis that the remedies in the federal courts and before the Federal Trade Commission are exclusive.

The second erroneous premise is that the trial court capriciously cut short petitioner's opportunity to produce evidence supporting its pleas. Petitioner refers to "the unfinished pre-trial conference" (Brief, p. 25), and asserts that "no issue of fact was ever tried" (Petition, p. 4). The 520 pages of recorded testimony and exhibits, as well as the exhibits inadvertently omitted from the Record, are disregarded. The charge that the procedure followed was improper under state practice does not present a federal question, and indeed no federal due process objection was interposed in petitioner's application for rehearing,[a] in its assignment of errors, or at any other stage below.

I. There is no final order of the Florida Supreme Court appearing in the Record and certiorari must therefore be denied. The opinion is included in the Record but not a judgment order. The Court in such circumstances is without authority to exert jurisdiction. *Gersch* v. *Chicago*, 226 U. S. 451.

II. There was no departure from accepted state practice in the proceedings below. The taking of testimony as part of a pre-trial procedure and upon respondent's motion to strike or compel amendment is in accord with the settled practice of the Florida Courts, duly authorized by the Statutes and by the Court Rules. The effort of the court is directed toward defining the issues and ascertaining whether the complaint or pleas interposed have a foundation in fact. In the event that no relevant substantiation can be advanced in support of the complaint, on the one hand, or the pleas, on the other, summary judgment is entered.

Fla. Stat. 1941, §§ 50.21, 50.27, 50.30, 90.17, 90.18, 90.19;

Rules 22, 27, 54, Florida Rules of Practice (122 Fla. 881-890);

[a] The application of petitioner for rehearing was not designated for printing, but an examination of it shows no claim of deprivation of rights under the Fourteenth Amendment by the proceeding below.

Order of the Supreme Court of Florida entered January 12, 1940, establishing Pre-Trial Procedure (141 Fla. 327);

Order of the Circuit Court for Hillsborough County entered June 21, 1940, adopting the rule for Pre-Trial Procedure;

*Hillsborough County* v. *Sutton*, 8 So. (2d) (Fla.) 401;
*Brash* v. *Ehrman*, 56 Fla. 153, 47 So. 937;
*Rhea* v. *Hackney*, 117 Fla. 62, 157 So. 190, 194.

As stated, the respondent interposed a motion to strike or to compel amendment of the pleas. The nature of the charges contained in petitioner's pleas apparently suggested to the trial court the desirability of utilizing the pre-trial procedure for determining the real nature of petitioner's grievances (R. 4-13; 57). After all relevant evidence had been taken, the record contained no showing that the Robinson-Patman Act had been violated by respondent, and established that each of petitioner's pleas had been disproved by respondent's evidence. Accordingly, the Florida Supreme Court entered judgment on the facts for respondent in keeping with Florida practice which does not require submission of the case to a jury under these circumstances. Cf. *Hillsborough County* v. *Sutton*, 8 So. (2d) (Fla.) 401. A similar practice of entry of summary judgment on the basis of affidavits or interrogatories is well known in federal courts.

It is apparent that, even if the due process question had been injected into this case, jury trial is not a prerequisite of due process in State Courts. *Wagner Co.* v. *Lyndon*, 262 U. S. 226, 232. And it is certainly not necessary state procedure to submit issues of fact to a jury when a trial court has become advised under appropriate procedure that judgment must in any event be summarily entered.

III. There remains the question actually presented on the Record before this Court, that is, whether under state practice the evidence tendered in the full pre-trial proceeding was sufficient to require submission of the case to a jury. This issue inevitably involves a determination of state law

questions. Insofar as a federal question is presented for decision, the question simmers down to whether the evidence contained in the voluminous record would support a finding of violations of the Robinson-Patman Act. That is not the kind of question this Court will customarily review. *Houston Oil Co.* v. *Goodrich*, 245 U. S. 440. Whether or not the proof tendered in the state court proceeding was sufficient to show violations of the Federal Act is not a question of any general public importance. The situation must be distinguished from one where the Federal Trade Commission, after full exploration, has found violations of the Act. Since the Commission has the ability to make a complete investigation and the power to order cessation of unlawful practices, any determination by it has widespread ramifications. The instant decision, however, does not legalize any alleged unlawful practices; it simply authorizes collection of a judgment on renewal notes. On a different record, different conclusions might be reached. Any decision by this Court, therefore, could do no more than hold that under Florida state practice sufficient evidence was produced by petitioner to entitle it to a jury trial.

An examination of the unchallenged facts produced in evidence demonstrates that there was ample basis for the court's conclusion that no discriminatory practices on the part of the respondent had been shown. Respondent supplied a small can, 5¾ ounces, to Engleman Gardens, a Texas competitor of petitioner operating a cannery some distance from Houston, Texas (R. 66). The can, without extras for lithographing, was supplied at a price of $9.68 per thousand, f.o.b. Houston, where the can was manufactured by respondent (R. 544). At the same time petitioner was sold the 6-ounce can on which it had standardized at an early date at $10.14 per thousand, f.o.b. Tampa (R. 65). The freight paid by petitioner's competitor to ship the 5¾ ounce can to the Texas cannery brought the total delivered price to $10.18 per thousand (R. 66). The undisputed evidence shows that the additional amount of tin plate in the 6-ounce can alone

cost the respondent around fifty cents per thousand (R. 541, 542).

The two cans are not the same product, and there was therefore no obligation upon respondent to charge the same price. Indeed, the evidence discloses that the additional cost of producing the larger can would make it economically impossible to charge the same price as that charged for the smaller container. It is true that the 5¾ ounce can of fruit juice was sold competitively against the 6-ounce can of fruit juice. That does not make the two cans supplied the canners the same product. Surprisingly enough, this claim of discrimination was the heart of petitioner's complaint when reduced to concrete form by the pre-trial procedure.

Still more surprising is the fact that out of the $114,000 of notes sued upon, $102,000 represented the price of cans sold prior to the establishment, in September, 1939, of the $9.68 price which petitioner claims was discriminatory (R. 182, 544, 579-580). The petitioner's claim, therefore, resolves itself into an assertion that when goods have been sold in the ordinary course of business and at any time thereafter before payment is made the seller violates the Robinson-Patman Act, the buyer may retain the goods without paying for them.

Petitioner also asserted illegality grounded on a failure to quote it a price of $9.68, f.o.b. *Tampa* on a 5¾ ounce can.[4] Respondent quoted it a price of $9.68 f.o.b. *Baltimore*, the nearest factory where respondent produced the 5¾ ounce can (R. 285). The Robinson-Patman Act does not require that respondent equalize or absorb the freight to Tampa on a product which it manufactures and sells at Baltimore. The 5¾ ounce can was never manufactured at Tampa (R. 545).

Another allegation in the pleas interposed by the petitioner, and again urged in this Court, was that closing equipment was furnished to competitors of petitioner free of

[4] It should be noted that petitioner did not assert that respondent refused to sell it this smaller can, even after expending a large sum for facilities at Tampa to make 6-ounce cans for petitioner.

charge, but that petitioner was compelled to pay for such necessary machinery. Although full opportunity to substantiate this charge was presented in the proceedings below, no evidence was produced to support this charge.

The final charge of discrimination advanced by petitioner was directed to respondent's quantity discounts given large customers who allegedly were competing with petitioner. The discount system established by respondent, as shown by the evidence in this Record, was set up when the Robinson-Patman Act was enacted to bring the company in complete compliance with the federal law (R. 572). The discount schedules were not, as petitioner alleges (Petitioner's Brief, p. 28), unrelated to actual experience or cost accountancy. Mr. Smith testified, and there is other uncontradicted evidence to like effect, that as soon as the Act was passed, the company proceeded to make a thorough and far-reaching examination of actual costs of serving its various customers (R. 573). The respondent offered in evidence the result of these cost studies. The exhibits are not printed, but are before the Court.

The studies showed that the sales cost of servicing small volume purchasers was materially greater than that in serving larger accounts. These studies also showed that the cost of selling and servicing accounts varied with the volume of annual sales, so that the larger the sales, the smaller the selling costs. The actual figures showing these savings are set forth in the unprinted exhibits. The frequent references in the petition to the fact that no allowance was made, in setting up the discount schedules, for the quantity of cans purchased by a customer from a particular factory of respondent is entirely misleading. (See, *e.g.*, Petitioner's Brief, p. 27.) Petitioner states, without any support in the Record, that the manufacturing costs of respondent must surely vary from plant to plant. But the discounts were not established on the basis of differences in manufacturing costs. In fact, respondent never contended that the cost of manufacturing cans for a large volume consumer was any

different from the cost of making similar cans for a small buyer. The plant from which delivery was taken had no bearing whatsoever on the total annual cost of selling and servicing the customer. It was this difference in the cost of selling and servicing large and small customers, respectively, which is the justification for the discount schedules.

The discount schedules related the scale of discounts to the volume of purchases. The attack made on these discount schedules in the petition is that expenses are averaged for customers purchasing various quantities. The Act does not prohibit a reasonable allocation of costs based upon actual cost figures. "[A] discount is not to be condemned merely because it does not mathematically accord with cost differences. The problem is a practical one and must depend upon the effect and intent of the scheme as a whole." *In the Matter of Goodyear Tire & Rubber Company*, 22 F. T. C. 232, 330. In any event, it is difficult to see how petitioner has any standing to complain about the averaging of the costs of sales to all small customers, since the uncontradicted evidence in the present Record reveals that the cost of selling and servicing petitioner exceeded that of any other customer of respondent (R. 513, 536).[5]

IV. If the Record in this case is deemed to present the issue of availability of the defense of illegality under the Robinson-Patman Act—and we submit the Record cannot so be construed—it is submitted that certiorari nevertheless should not be granted. It is essential that the precise issue be borne in mind. The petitioner did not counterclaim for its actual damages but asserted that all liability to respondent was voided.

No conflict of law has been cited as a foundation for review. Such cases as *Bement & Sons* v. *Harrow Co.*, 186 U. S. 70; *Continental Wall Paper Co. v. Louis Voight & Sons*

[5] For example, respondent's records reveal that more than seventy visits per year were required by representatives of respondent to petitioner's Tampa plant (R. 531).

*Co.*, 212 U. S. 227; *Pratt* v. *Paris Coke, Light & Coal Co.*, 168 U. S. 255; *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, have no application here. Under these cases a contract to be deemed unenforceable must be in itself the instrument of restraint on trade in violation of the Sherman Act. The courts refuse to enforce such a contract, not because of a desire to benefit the debtor who has himself been a party to the illegal restraint; enforcement is declined because the unlawful obligation would itself cause the restraint. Unlike a contract which is in itself a restraint on trade, there was nothing illegal about the sales of cans out of which the renewal notes in the instant case arose. The gist of petitioner's complaint is that concurrent, or even subsequent, sales to others at *lower* prices were unlawful and resulted in injury to it. But collateral illegality even under the Sherman Act has never been deemed to outlaw a contract legal in itself. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 545, 549.

There are ready remedies available to a person injured by violations of the Robinson-Patman Act. There is no basis for petitioner's suggestion that the treble damage action is not effective. In fact, such a suit has been instituted in this instance and is now pending. Petitioner, however, has here interposed a defense which would outlaw its entire obligation for goods purchased irrespective of the degree of injury it had suffered. For example, it is conceivable for a situation to arise where a series of purchases has resulted in a debt of $2,000,000.00 to a seller—which is the value of the total purchases made by petitioner. Assume *arguendo* that as a result of minor Robinson-Patman Act transgressions, the buyer had been injured to the extent of $10,000.00. In a treble damage action, he could recover $30,000.00. But under petitioner's scheme of voiding all liability, recovery would be denied for the entire $2,000,000.00 in addition to the amount recovered in a treble damage suit. Thus the buyer would be compensated for more than two hundred times his actual damage, and thus

interpreted, the Act would raise serious questions of constitutionality.

There is another aspect of the present case which should be emphasized. The obligations represented by the renewal notes were accumulated over a period of time to October, 1941 (R. 579, 580). The $114,000.00 of renewal notes here in suit cannot be tied up to particular sales, since the sales were far greater in amount than the sum in suit. The record shows that small size individual service cans were purchased by petitioner from respondent from 1936 to 1942 (R. 372). The only claim of discrimination in the small can field is based on respondent's conduct commencing in September, 1939 (R. 182). The record shows not only that the discrimination alleged occurred after most of the original indebtedness arose, but that the charge is unfounded since two different size cans are involved. In addition, petitioner offered no proof as to competitive injury resulting from any sales other than those of the 6 ounce can. Even assuming *arguendo* that unlawful discrimination may have existed as to some sales, it is impossible to determine the sales whose price is reflected in these renewal notes. No separate accounts were kept of small and large cans and the original notes represented indebtedness in a "blanket way" (R. 373, 374). This further illustrates the fallacy of petitioner's position that such renewal notes, after partial reduction of the entire indebtedness for all purchases over six years, are wholly void. The burden of proving that the debt to respondent represents particular transactions involving collateral illegality is squarely on petitioner who pleads such illegality by way of defense. No such proof was ever tendered by petitioner.

V. The memorandum of Congressman Patman, as amicus, obviously is premised on the erroneous assumption of the petition that the court below has denied the right to plead a violation of the Robinson-Patman Act in a suit in a state court. He deems such a ruling contrary to the intent of Congress, though no such intent anywhere appears. How-

ever, as above pointed out, the court below did not undertake to make a hypothetical ruling on this abstract question of law. No "definitive answer" can be given to a question not decided below and therefore not presented here. Petitioner, under local practice, presented its proof and failed on the merits to show the necessity of submitting the issue of illegality to a jury. Petitioner has had its "trial at law as to whether this system as it operates is lawful" on the facts presented by the present Record. There is no occasion to afford petitioner another trial.

## CONCLUSION.

The broad legal questions sought to be raised in the petition are not involved in this case. The question decided is primarily factual in nature and has no public or general importance. The decision is correct and presents no conflict of decisions.

Respectfully submitted,

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No. 402

JAN 5 1946

IN THE

# Supreme Court of the United States

October Term, 1945.

BRUCE'S JUICES, INC., *Petitioner*,

v.

AMERICAN CAN COMPANY.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Florida.

## BRIEF FOR THE RESPONDENT.

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IN THE

# Supreme Court of the United States

October Term, 1945.

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No. 402.

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BRUCE'S JUICES, INC., *Petitioner*,

v.

AMERICAN CAN COMPANY.

---

**On Petition for a Writ of Certiorari to the Supreme Court of the State of Florida.**

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## BRIEF FOR THE RESPONDENT.

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### OPINIONS BELOW.

The Circuit Court of Hillsborough County did not write an opinion. Its findings of fact and conclusions of law appear at R. 580-582. The opinions of the Florida Supreme Court on hearing and rehearing (R. 593-601, 621) are reported in 22 So. (2d) 461.

### JURISDICTION.

There is no judgment order of the Florida Supreme Court in the Record. Nor does petitioner's Designation (R. 623) contain directions to the clerk of the court below

to include such an order in the Record. The petition for a writ of certiorari was filed on September 5, 1945. The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code.

## QUESTIONS PRESENTED.

1. Whether the defense of illegal practices by the seller under the Robinson-Patman Act is available in a state court suit on renewal promissory notes to void the indebtedness.

2. Whether the court below properly ruled that on the facts developed in the pre-trial procedure the summary entry of judgment should be affirmed.

## STATUTE INVOLVED.

The Robinson-Patman Act, in relevant part, is printed at page 54 *et seq.* of Appendix B to petitioner's brief.

## STATEMENT.

The respondent American Can Company sued the petitioner, Bruce's Juices, Inc., in the Florida State Court on four renewal notes. These notes had been given by the petitioner in renewal and consolidation of a series of earlier notes given to settle an accumulated indebtedness for cans purchased. None of the renewal notes on which suit was brought is tied to a particular purchase. None of the original notes for which they had been substituted, and none of the open account sales out of which some original notes arose, had been tied to a particular transaction. (R. 373.) In part the renewal notes represented unpaid interest on the old notes. (R. 361-62.) There was no challenge to the amount of any one of the notes nor was there any challenge to the amount of the accumulated aggregate indebtedness which they represented. The principal defense offered was the allegation that in some of the sales originally made —the price of which may to some undisclosed extent have been reflected in the accumulated indebtedness—the respon-

dent had unlawfully discriminated against the petitioner in violation of the Robinson-Patman Act. It was pleaded that these allegations, if they could be proved, rendered the consideration illegal and the notes void. (R. 4-5.)

The record discloses the following: Bruce's Juices, Inc., the petitioner, is a processor of fruit juices operating canneries located at Tampa, Florida; Bridgeville, Delaware; Geneseo, New York; and Santa Rosa, Texas. It also has products canned for it at Vincennes, Indiana. (R. 378.) From 1928 to 1942 it purchased under a series of term contracts most of its cans from the respondent, The American Can Company. (R. 62-64, 106-107, 129, 377.) The remainder of its needs was purchased from The Continental Can Company. (R. 372.) Petitioner has never considered itself bound by any "corporate feudal tie" to the respondent. (Cf. Petitioner's Brief page 28.) Petitioner at the expiration of any one of the successive contracts with American Can Company was always free to contract with some other supplier for its cans, and since December 31, 1942, it has actually done so. In fact, as early as 1937 petitioner made plans to purchase all of its cans from Continental which had a factory in Tampa and at various other points throughout the country. (R. 88-89, 474, 535.)[1] Moreover, since 1942 other can manufacturers have replaced respondent as petitioner's can supplier. (R. 377)

In accordance with the customary practice in the canning industry petitioner between 1928 and 1942 bought cans from time to time under its requirements contracts with respondent. Its purchases fell into two groups. The first consisted of the standard sizes of what are known as sanitary cans and in this record referred to as *grocery* sizes. In normal times, respondent manufactures approximately 300 styles and sizes of sanitary tin cans of which five are standard size sanitary cans in wide use. (R. 545.) Respondent's factory in Tampa, Florida is equipped to manufacture several but not all the different can sizes. Petitioner purchased

[1] The Crown Can Company also operated a can manufacturing plant in Florida. (R. 535.)

grocery size cans from respondent both before and after enactment of the Robinson-Patman Act on June 19, 1936.

The second group of its purchases consisted of *individual service cans*. Beginning in 1936-1937 petitioner started experimenting in Tampa with cans of small sizes holding an individual serving of juice which it planned to sell to stores handling soft drinks. (R. 378.) It tried out cans of various sizes, including those holding five and one-half and five and three-quarters ounces. (R. 379.) In the fall of 1938, petitioner decided to standardize on a 6-ounce can which would permit competition with Coca Cola and other 6-ounce soft drinks. (R. 382, 547.) The can was sometimes supplied petitioner by respondent from Baltimore with freight equalized to Tampa, *i.e.*, absorbed by respondent to that point. Respondent installed a special manufacturing line in its Tampa factory to make the 6-ounce can, at a cost of approximately $100,000.00. (R. 547.) Respondent's cooperation in this respect and the generous line of credit made available commencing in 1937 enabled petitioner's pioneering venture to prosper. In 1939 alone when much of the indebtedness involved arose, more than 11,500,000 small cans were used by petitioner. (R. 556.)

Petitioner was a difficult account to sell and service. The uncontradicted evidence in the present Record reveals that the cost of selling and servicing petitioner exceeded that of any other customer of respondent. (R. 353, 513, 536,)[2]

In addition, petitioner was a doubtful credit risk. In 1937 the respondent agreed to extend $125,000 in credit to the petitioner by accepting a series of interest bearing notes up to that amount. Petitioner was free to pay cash, or to give notes, or to pay part cash and give notes for the balance of any invoice. (R. 502, 503.) Each shipment made during each year was invoiced separately.[3] Some invoices

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[2] For example, respondent's records reveal that more than seventy visits per year were required by representatives of respondent to petitioner's Tampa plant. (R. 531.)

[3] See R. 526 for a typical invoice covering the sale of 48,000 small cans for $306.24.

were paid in cash; notes were given for others; and some were carried as an open account. (R. 88.) As the notes matured, they were paid in part, or replaced by other renewal notes, or consolidated in renewal notes. In 1942 all of the remaining aggregate indebtedness was consolidated in four renewal notes of approximately $114,000. (R. 579, 580.)

As already noted, petitioner did not and could not establish what portion of the indebtedness represented by the renewal notes arose after the enactment of the Robinson-Patman Act. Nor was it shown what portion of the indebtedness represented the sales price of grocery size cans or individual serving cans. For example the alleged discrimination against petitioner in the sale of small serving cans is not charged to have occurred before September 1939 (R. 182), yet the record definitely establishes that at least $102,000 of the total amount of the notes reflects indebtedness for cans purchased before September 1939. (R. 251-256.) It also seems likely that the balance of the total amount of the notes represents an indebtedness arising prior to that time (R. 88, 90), but in no event has petitioner shown that any indebtedness arose after June, 1940. (R. 579.)

The alleged discrimination through use of quantity discounts during the period when the indebtedness arose was confined to companies described as competing with the petitioner in the *grocery* size can fruit juice field. (R. 506.) The first sale of small cans to a competitor who received a quantity discount was that made to the Morgan Packing Co. in September, 1940. (R. 226.) Therefore there could have been no discrimination prior to that date resulting from any allowance of quantity discounts to a competitor purchasing small cans. Petitioner could not and did not offer any evidence to establish what portion of the total amount of the four notes represented a prior indebtedness arising out of the purchase of the grocery size cans. Petitioner's President testified merely that the earlier indebtedness, as well as the consolidated renewal notes, represented amounts due for the purchase of cans "in a blanket

way", including both the grocery size cans and the individual serving size cans. (R. 373, 374.)

Suit was instituted by respondent in the state Circuit Court on June 23, 1942, for the collection of the notes. On October 2, 1942, petitioner brought suit against respondent in the United States District Court for treble damages, pursuant to 15 U. S. C. §15, authorizing such suit in federal courts for violations of the Robinson-Patman Act resulting in injury to the claimant. (R. 501.) On October 5 petitioner filed its pleas in the state court suit.

The pleas, though general, set up five defenses. One defense was that the renewal notes had been given conditionally—on condition that adjustments be made on the amount due—and that since the adjustments had not been made, payment was not due and the notes were void. This was abandoned in the Florida Supreme Court. (R. 600.) The other four defenses were based upon alleged illegal discriminations by respondent against petitioner in the original transactions. The pleas simply recited the language of the Robinson-Patman Act and charged that the generally alleged discriminations rendered the renewal notes void.[4]

The petitioner claimed, first, that other canners were charged lower prices for cans of substantially the same grade.

Second, respondent was accused of furnishing equipment for closing cans without charge to competitors, while charging petitioner for such machinery. No effort to prove this charge was ever made and it was abandoned below. Third,

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[4] The allegations that the notes are void have significance since petitioner's brief vacillates as to the status of the indebtedness and at least in one place (p. 5) suggests that petitioner's pleas were that the notes represented "the excess" charged and "the excess" was not lawfully due. An examination of the pleas (see, e.g., R. 4, 5) shows petitioner raised as a defense that the notes were given "as part of a transaction involving the sale of cans by the Plaintiff to the Defendant, and that said notes evidenced the purchase price of said cans; that the transaction involving said sales of cans was unlawful . . . therefore, the consideration for said notes is illegal and said notes void and of no force and effect." (R. 4, 5.) The same form is used in each plea.

it was alleged that illegal discounts were granted other customers. Fourth, it was contended that for the purpose of destroying respondent's competition cans were sold in Texas for a lower price than that charged petitioner in Florida.

The respondent demurred to the pleadings and also moved to strike or in the alternative compel amendment.

Pursuant to Florida law, the trial judge ordered a pre-trial conference, in part to simplify the issues and to avoid unnecessary proof by securing admissions. (R. 57-58.) In addition, he ordered the parties to present their witnesses and evidence in support of their pleadings. (R. 58.) He authorized depositions to be taken where necessary. The purpose of this procedure was declared to be "to *simplify and determine* the issues between the parties, and for the purposes hereinabove set forth." (R. 58.)

Under Florida practice each party understood that if it failed to show that enough evidence could be produced to require submission to a jury, the law suit might be terminated. *Hillsborough County* v. *Sutton*, 8 So. (2d) (Fla.) 401. The parties therefore proceeded to take evidence before the trial judge, by deposition in New York City, and again in Tampa before the trial judge. Five hundred and twenty printed pages of testimony and exhibits were accumulated. In addition, a great many other voluminous exhibits were received in evidence. These should have been printed, but were omitted by inadvertence on the part of the Clerk of the Court below and have now been filed with the Clerk of this Court under Rule 10 of this Court by order of the Florida Supreme Court.

During the taking of testimony in New York, certain questions asked witnesses were temporarily not answered and were certified to the trial court for ruling on questions of relevancy and propriety. This procedure was in accordance with the terms of the order for the pre-trial conference. (R. 39.) There was ample opportunity to secure these rulings; but no attempt was made by petitioner to secure such rulings. The questions asked were exceedingly broad

and there was good reason to believe that they were designed to harass respondent and to compel disclosure of a large amount of confidential information pertaining to the private business of numerous other customers of respondent who were competitors of petitioner. Instead respondent stipulated to certain relevant matters and relied on the trial court to determine essentiality of the other material.

After the case had been fully explored, the trial judge asked if either side wanted to take any further testimony or "if both sides are closed: both sides." (R. 578.) Counsel for petitioner said his case was closed unless the court deemed the certified questions pertinent. (R. 578.)

Subsequently, the trial court entered findings of fact and conclusions of law. (R. 580-582.) First, it found that the evidence showed execution and delivery of the notes in the specified amount. Second, it found that the evidence failed to disclose a conditional delivery. The evidence offered by petitioner was held to have fallen "far short" of showing that plaintiff ever agreed to an adjustment. Finally, the defense of illegality of consideration was held unavailable since the federal law was deemed to prescribe the exclusive remedies to persons affected by violation of the Robinson-Patman Act.

On appeal by petitioner the Florida Supreme Court, by a 5-2 vote, reversed the judgment below, holding that the defense of illegality could be interposed in the state court and that the case must go on trial. Respondent petitioned for a rehearing, asserting that the court had erred as to the law. Respondent also asked the Florida Supreme Court in the alternative to examine the evidence and affirm the judgment on what the record disclosed. (See R. 616.) Rehearing was granted and argument and briefs were submitted. After this rehearing the Florida Supreme Court filed a *per curiam* opinion in which four of the seven judges joined, stating:

> "We are of the opinion that the defense attempted to be interposed was not available under the facts submitted in evidence to the court below and, therefore, the judgment should be affirmed." (R. 621.)

One of the judges who joined in this *per curiam* on the facts also filed a concurring opinion of his own, on the further ground that the pleas were not "legally available as a defense in the state courts in a common law suit on the promissory notes involved."[5]

Petitioner's application for a second rehearing was subsequently denied. (R. 622.)

## SUMMARY OF ARGUMENT.

I. A violation of the Robinson-Patman Act by the seller, even if one occurred, does not remove the obligation to pay for goods received by petitioner. Petitioner's contention, on analysis, necessarily is that all obligation to pay for goods received is cancelled by a price concession illegally given by the seller to another customer. Such a consequence does not flow from the Act.

The Act does not outlaw price differences. Whether illegality has actually occurred requires an examination into the collateral sales of the seller, the substantiality of the effect of the illegal discrimination on competition, and the cost justification of the seller. No single sales transaction is illegal. The Act prohibits as unlawful a *relationship* between sales where such relationship has specified effects on competition. This is quite a different matter from refusing to enforce a contract which is itself in restraint of trade in violation of the Sherman Act, an act having a common law origin.

The legislative history of the Robinson-Patman Act contains detailed discussion of the problem of enforcement. A

[5] Petitioner insists with some vehemence that the concurring judge did not join in the *per curiam* though his name is listed with the others as joining in it. There would seem to be little occasion to argue this point, though it may be noted that under petitioner's view there is no majority of the judges of the highest court of the State of Florida which has endorsed either the non-availability of the defense of violation of the Robinson-Patman Act or the non-violation of the Act by the business practices here involved. Under this view, since no controlling law has been established, it may be suggested that certiorari should be dismissed.

proposal for changing the treble damage remedy to permit recovery in a federal court without showing damage, for the difference between the price charged the most favored customer and that charged the aggrieved, was rejected. Nowhere in the debates, committee reports, or hearing was the remedy advocated by petitioner so much as mentioned.

Neither the federal nor state court is equipped to deal with such a complicated defense in the process of suit to collect a debt. The proceeding necessitated under the Act to show illegal discrimination is more involved than a rate proceeding. Among other things, effect on competition, the need to meet a competitor's lower price, and the justification of differences in prices because of difference in cost of manufacture, sale or delivery, must be examined. The need to introduce cost justification alone would render the process of collecting on commercial paper hopelessly cumbersome.

The necessary expertness and centralization necessary for a sound interpretation and application of the Act can only be provided by the Federal Trade Commission. Reliance on the state courts will simply destroy the ready collectibility of commercial paper, which is the foundation of ready credit. The Act intended to aid small business, but if petitioner's interpretation is adopted by this Court many a seller will refuse to extend credit to new enterprise or to any customer not entitled to his lowest price, for fear of endlessly being tied up in any effort to collect his money.

II. The court below properly ruled that on the facts developed in the pre-trial conference the summary judgment should be affirmed. Such judgment, after a pre-trial procedure, is in accord with settled Florida practice. The petitioner totally failed to substantiate its pleas that the renewal notes, on which suit was brought, represented the sales price for cans purchased at prices discriminating against it. Petitioner failed to identify the composition of the debt as between individual service cans and grocery cans. There was no illegal discrimination in the sale of

individual service cans. Further, during the period in which the indebtedness here involved arose, no customers in the quantity discount brackets purchased the individual service cans. Though petitioner now rests on the illegality of the quantity discounts in the grocery can field, petitioner was unable to establish what part, if any, of the renewal notes were represented by the purchase price of grocery cans. If the defense were held available under these circumstances, the rule of law would be that once an illegal sale is made of any article, the seller cannot recover for the sale of any other article, legitimate as that sale may be. The seller would become an outlaw. Petitioner has not openly contended for such a rule, but its proof has failed to show the identity of the articles represented by the debt and the articles sold to others on which quantity discounts were granted.

As to the grocery cans, even assuming that they were represented in the debt, and the extent of that representation had been proved, there was no showing of any effect on competition resulting from the quantity discounts given. Furthermore, respondent introduced cost studies establishing that savings in the cost of selling larger customers more than justified the discounts given. Though petitioner objects to a minor item of "commission" expense [redacted] charged its group, petitioner has no cause to complain about its classification, since it was an exceptionally expensive customer to sell. The Act does not require the impossible: it does not require a cost study for each customer and a different price for each customer. What was done was reasonable in the light of Federal Trade Commission rulings.

## ARGUMENT.

**I. The defense of illegal practices under the Robinson-Patman Act is not available in a state court suit on renewal promissory notes to void the indebtedness.**

A. *Petitioner's position is that a purchaser in the ordinary course of business may refuse to pay the sales price for goods purchased on the ground that collateral illegality renders the contract unenforceable by the seller.*

Petitioner's position, stripped to its essential character, is that a price discrimination practiced in favor of its competitors creates for it a defense to a suit on an indebtedness based on transactions which in and of themselves were strictly legal. The nature of this defense is one that petitioner in its brief does not describe with consistency. Upon analysis, however, it seems clear that petitioner's position comes down to the contention that a purchaser in the ordinary course of business may refuse to pay anything for the goods bought, on the ground that the seller in the operation of his business has violated the Robinson-Patman Act. The defenses are pleaded in this manner. (R. 4-13, 41-46). Before meeting directly the real question thus presented, we shall first deal with the attempted modifications of these defenses which petitioner now suggests in its brief.

First, it is asserted that the defense is posited on a sum being due petitioner equal to the amount of price concessions that petitioner would have received if charged the same price as another customer paying the lowest price. (Pet. Brief, p. 5.) This, it is to be noted, is not a defense of voidness at all, but a kind of counterclaim in a state court for the difference between the seller's lowest price and the price charged the buyer, without the need to show competitive injury. Clearly the petitioner has the right, if it can establish damage, to sue for treble damages in a *federal* court. In creating this right Congress confined it

to the federal courts. The bill which became the Robinson-Patman Act proposed at one stage a new remedy in the *federal* court by removing the need to show injury and allowing the method of measuring recovery by the amount of price concessions given others, per unit of purchase.[6] This suggested new remedy was not adopted by Congress. Petitioner now seeks to resurrect it in the state court. It seeks to do so, furthermore, as has been noted on a plea of voidness and not by way of counterclaim.

Second, petitioner suggests that, though the notes are void as contrary to public policy, recovery on a quantum valebant theory, may nevertheless be had for the reasonable value of the cans delivered. There is no need for elaborate answer to the suggestion that the fair value of the goods has already been paid. Petitioner's brief states that the record "suggests the strong probability that petitioner has already paid the fair value based on prices at which American Can Company sells to its larger competitors." (Pet. Brief, p. 8.) This is wholly belied by the record. None of the notes, as petitioner's President testified, can be related to any particular transactions. (R. 373,

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[6] See S. 3154, § 2(d), 74th Cong., 1st Sess., introduced June 26, 1935; H. R. 8442 § 2(d), 74th Cong., 1st Sess., introduced June 11, 1935; S. 3154, § 2(d), 74th Cong., 2d Sess., reported out February 3, 1936. See S. Rep. No. 1502, 74th Cong., 2d Sess., p. 8:

> "The measure of damages provided in section (d) is the amount of the forbidden discrimination or allowance found to have been granted, limited however to the volume of the plaintiff's business in the goods concerned, or to the amount which he would have received had the allowance been granted to all on the equal basis which the bill requires. The underlying principle of the bill is the suppression of unjust discriminations, and it seems both fair and just, and in harmony with that principle, to enable those victimized by its violation to restore themselves, *through the recovery of damages, to the equal position which they would have occupied* had the violation not been committed." (Emphasis added.)

The Senate alone enacted this provision and ultimately receded in conference. Conference Report, H. Rep. No. 2951, 74th Cong., 2d Sess., p. 8.

374.) As will be seen, a price *difference* is not an *unlawful discrimination* even apart from any question of justification under the Act.

It is submitted that if illegal discrimination renders these notes void, public policy would not permit recovery of the fair value of the cans represented by them. The law as established by this Court is clear that transactions under a contract void for illegality will not sustain quasi-contractual or other recissionary relief any more than an action upon the contract.[7]

Petitioner is thus logically driven to the position that a sales transaction legal on its face creates no valid obligation to pay for goods received where illegal concessions have been made to other customers. This is the position taken by the pleas of petitioner which allege that the promissory notes involved arose out of sales transactions and that the notes evidence the purchase price of cans, that respondent has given illegal price concessions, and that the notes are therefore void and of no force and effect. (See e.g., R. 4, 5.) No effort was made—in the pleas, in the court below, in its petition here—to consider whether the amount of the notes is less than or exceeds the amount of the alleged discrimination. No proof of competitive injury is offered. Under petitioner's argument any degree of collateral discrimination renders the notes void. Necessarily, petitioner's position comes down to arguing that if a buyer of cans has

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[7] *Harriman* v. *Northern Securities Co.*, 197 U. S. 244, 295-296 (1905); *St. Louis, Vandalia & Terre Haute R. R.* v. *Terre Haute & Indianapolis R. R.*, 145 U. S. 393, 407 (1892); *Dent* v. *Ferguson*, 132 U. S. 50, 64-65 (1889); *Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 396, 411-412 (1889); *Gesellschaft Fur Drahtlose Telegraphie M.B.H.* v. *Brown*, 78 F. (2d) 410, 413 (App. D. C., 1935), *cert. den.* 296 U. S. 618 (1935), *s. c.* 104 F. (2d) 227 (App. D. C., 1939). *Accord*, 6 Williston, *Contracts* (rev. ed. 1938), sec. 1786 A, pp. 5074-5075; 2 Restatement, *Contracts* (1932), secs. 598-609; Restatement, *Restitution* (1937), sec. 140; Brown and Rubin, *The Effect of Wartime Price Control on Contracts for the Sale of Goods*, 52 Yale L. Journ. 74, 88 (1942). None of the exceptions suggested by Williston or the Restatements of Contracts and Restitution would be remotely applicable here.

been extended a broad line of credit, whether or not reflected in notes, he may profit many hundredfold for any damage caused by some violation of a general statute. This must follow if a sales transaction legal on its face creates no legal obligation to pay for goods received in instances where collateral illegal concessions have been made to other purchasers.

Before considering whether the Robinson-Patman Act voids any sales transaction (other than a sale where both seller and buyer are parties to an illegal agreement), or adverting to the reasons which should make this Court reluctant to write into that Act what Congress specifically refused to enact, we call attention to the settled doctrine that even where a contract is forbidden, transactions under it are not *per se* void. "In determining what validity, if any, a forbidden contract has, it is often important to consider how far and for what reason the prohibited transaction is wrongful, since the courts will endeavor so to deal with the transaction as to give effect to the fundamental purpose of the Legislature and to a wise public policy."[8] See also *Harris* v. *Runnels*, 12 How. (53 U. S.) 79.

B. *The Robinson-Patman Act does not render illegal the sales transactions between petitioner and respondent.*

Petitioner grounds its claim that the notes here in suit are void and uncollectible on the allegations that respondent has violated the Robinson-Patman Act by unlawfully discriminating against the petitioner. Repeatedly it asserts that the original sales transactions were illegal on their face.[9] Its position must be measured against the statutory text upon which reliance is had.

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[8] 6 Williston, *Contracts* (rev. ed. 1938), sec. 1764, p. 5006.

[9] This assertion is made in various exaggerated forms. For example it is asserted that illegality is found "in the face of contracts admittedly discriminatory." (Pet. Brief, p. 15.) As will be seen the Robinson-Patman Act does not deal merely with price *differences*. The only thing shown by petitioner's contracts with respon-

First, turning to the penal provision of the Robinson-Patman Act, it will be seen that this section in express terms defines what conduct is unlawful. This penal provision reads:

> "Sec. 3. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.
>
> "Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both."

In its defense petitioner does not allege that the contract to which it was a party discriminated against its competitors, but, on the contrary, alleges that petitioner was an innocent party, illegally discriminated against by respondent through sales made by it to other customers, and that this petitioner vested with all the rights and remedies given

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dent are price differences. The other requisites, necessary under the statute, to demonstrate the violation are discussed below. But it is patent that a mere price difference between two transactions even though covered by the same uniform type of sales contract, in no way demonstrates that the respective purchasers were competing, that the goods were of like grade and quality, or that the requisite substantial injury to competition was present.

by the statute to such an injured party. Obviously, therefore, the contracts between these parties are not proscribed by Section 3.

Neither the civil nor the criminal provisions of the Robinson-Patman Act prohibit *differences in price*. The Act does not prohibit price discriminations. What it does prohibit are *illegal price discriminations* and it provides a definitive yardstick for measuring illegality.

To put the matter another way, no single sale is *per se* illegal under the Robinson-Patman Act. It is necessary to examine the relationship of that sale to others by the same seller. The Act is directed against the competitive effects of an unlawful *relationship* between the price charged one buyer and that charged others. Neither price by itself is controlling. None of the sales transactions thus being compared is void. Inquiry is directed to, and any violation measured by, the relationship between prices. This is a commonplace in any interpretation of the statute. If the improper relationship among a seller's prices (*i.e.*, a discriminatory difference having the prescribed effect upon competition) rendered all the respective sales transactions void because of illegality, the effect would be that the giving of a benefit of a price differential to a single customer among thousands, if finally held to be illegal, would render void and uncollectible every sale to every other customer of the seller. A forfeiture of this magnitude is worked by no statute. Nowhere in the legislative consideration of the Robinson-Patman Act was any such result ever suggested.

Turning, therefore, to the relationship between two or more sales, it is clear from the remaining text of the statute that petitioner is virtually asking this Court to rewrite the Act. For it is manifest that a difference in price is not controlling. The Act directs on its face a series of inquiries: Are the goods of like grade and quality?[19] Are the two

[19] It is likewise necessary to establish that one of the two transactions is in interstate commerce, and that the goods were sold for "use, consumption or resale within the United States."

customers in such relationship as to render the difference in price a discrimination? A discrimination in price is illegal only if it has the specified effect *and* if it cannot be justified on the ground that it makes

> "only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities"

in which the goods are sold by the seller; or justified as responsive to changing conditions affecting the market for or the marketability of the goods concerned; or as having been made in good faith to meet an equally low price of a competitor.

The cardinal inquiry is as to the probable effect upon competition. The emphasis in the text of the statute on this point is clear. *Cf. Oliver Bros. Inc.* v. *Federal Trade Commission,* 102 F. (2d) 763, at 767 (C.C.A. 4th, 1939), "The effect of such discrimination" is to be examined to determine whether it may be

> "*substantially* to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition . . ."

Even a pronounced differential in prices may lack these requisites. Compare *In the Matter of Kraft-Phenix Cheese Corporation,* 25 F.T.C. 537.

Necessarily, recourse to the justifications provided by Congress requires examination of facts unrelated to the particular sale. Under the statute a discrimination in price having a demonstrated competitive effect may still be proper if justified by differences resulting from the differing methods or quantities sold or delivered. Ultimate violation may thus be dependent upon an examination of the seller's entire method of manufacturing or distribution. The justification of market conditions requires examination of facts even more widely dispersed than those directly

available to either buyer or seller. In like fashion, the defense of meeting competition makes illegality turn on the existence of facts rarely apparent on the face of any particular transaction or group of transactions between the individual buyer and seller.

In short, the Act does not make price differentiation illegal. Its legislative history demonstrates that all of those sponsoring it understood that price differences and price discriminations within the permitted confines of the statute is the essence of a highly competitive system. He who asserts illegality must demonstrate substantial competitive effect since price discrimination is permitted unless there are serious and substantial consequences.

> "The sponsors of the Act were not interested in preventing price discrimination as such, but in preventing the translation of such price discrimination into a competitive weapon."[11]

Thus a fixed one price system would be the essence of monopoly in cases where the cost of making goods, selling goods and delivering goods to one class of customer is different than that to another.[12] Price discrimination is thus specifically sanctioned by the Act.

Clearly, then, the Robinson-Patman Act, in purpose and in text, prohibits only those price discriminations which by collateral determinations may be found to have effects upon competition which may tend substantially to monopoly or to the substantial prevention or injury of competition at specified levels. Nowhere in its text or in its legislative history is there any suggestion that this statute, touching the web of all interrelated commercial transactions in the national economy, is to be read as rendering void on their

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[11] Zorn & Feldman, BUSINESS UNDER THE NEW PRICE LAWS (1937) p. 96.

[12] Nowhere is there clearer recognition of this than in this Court's opinion in *Sugar Institute, Inc.* v. *United States*, 297 U. S. 553.

face any particular transaction or group of transactions,[13] except where seller and buyer have conspired to violate the law.

C. *The refusal to enforce a contract restraining trade in violation of the Sherman Act is readily distinguishable.*

The Sherman Act, as petitioner has taken pains to point out, has a common law origin. It proscribes as illegal certain types of contract in restraint of trade. It was recognized in the common law that the court should not lend its aid to enforce a contract restraining trade. That policy has been carried over to the Sherman Act, so that one violator may not further the monopoly by compelling performance by another violator of a contract forbidden by the Act. The transaction can readily be distinguished from the instant one. The Robinson-Patman Act was of wholly statutory origin. It did not bar price differentiation; it tried to establish certain rules for price competition. It constituted "a venture into control" entering "new territory."[14]

The notes or contracts made with petitioner were not illegal; petitioner alleged collateral illegality in the form of price concessions given to other persons competing with it. An examination of the transactions between petitioner and respondent could not possibly reveal illegality or re-

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[13] The scope of the statute has been the subject of comment by all those who have dealt with it. Although it emerged largely out of chain store practices in the grocery field, its commercial impact is as universal as that of the Uniform Negotiable Instruments laws. "The Robinson-Patman Act is a striking example of such omnibus draftsmanship. This law is applicable throughout the whole of American industry. It affects and to a large extent controls buying and selling in every interstate transaction and in a large number of intrastate transactions. It necessitates the scrutiny of all commercial dealings in commodities beginning with the purchase of raw materials, through the manufacturing operation, and down to the sale of the finished product to the ultimate consumer." The Robinson-Patman Act (*Monograph*, WASH. POST) p. 1.

[14] Walton Hamilton, *Cost as a Standard for Price*, 4 Law & Contemp. Prob. 321, 333.

straint. The inquiry must be a collateral one and necessitates applying the standards found in the Act to examination of the entire gambit of the collateral sales to petitioner's competitors. Even under the Sherman Act collateral illegality will not void a contract itself innocent.

All the cases relied upon by the petitioner, both in this court and in the court below, were cases in which *plaintiff and defendant* had entered into a contract which was *in violation of a Federal statute and hence illegal and void, so that no action could be maintained upon it by either party.* The cases denied recovery on the illegal contracts.

*Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U. S. 227;
*Bement & Sons* v. *National Harrow Co.*, 186 U. S. 70;
*Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173;
*Embrey* v. *Jemison*, 131 U. S. 336;
*Pratt* v. *Paris Gas Light & Coke Co.*, 168 U. S. 255.

In *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, *supra*, it was held that the plaintiff and the defendant had entered into written agreements which were in flagrant violation of the Sherman Anti-Trust Law, and that the contracts of sale which were sued upon were based upon those illegal agreements, and were themselves illegal and void. The opinion distinguishes the case of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 545, hereinafter discussed.

In *Bement & Sons* v. *National Harrow Co.*, *supra*, the suit was for breach of patent licenses. The defendant alleged that the contracts were illegal under the Sherman Act but the Court sustained the contracts and awarded damages to the complainant.

In *Sola Electric Co.* v. *Jefferson Electric Co.*, *supra*, an action to recover royalties on a patent license to which both were parties, the defendant alleged that the license was invalid and that its price fixing provisions were in violation of the Sherman Act. This Court so found. In *Embrey* v. *Jemison*, *supra*, the suit was to recover upon a wagering

contract and the Court upheld the Statute which expressly forbade recovery upon such a contract. *Pratt* v. *Paris Gas Light & Coke Co., supra*, merely decided that a state court had jurisdiction to declare certain patents invalid when the assertion of invalidity was merely incidental to the defense of the action and where the invalidity of the patent was relied upon as avoiding the contract. None of these cases show more than a superficial and fallacious resemblance to the case at bar.

But there are other decisions of this Court directly in point.

*Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540;
*Small Co.* v. *Lamborn Co.*, 267 U. S. 248;
*Loughran* v. *Loughran*, 292 U. S. 216;
*Wilder Mfg. Co.* v. *Corn Products Ref. Co.*, 236 U. S. 165;
*Geddes* v. *Anaconda Copper Mining Co.*, 254 U. S. 590;
*Farmers & Mechanics Nat. Bank* v. *Dearing*, 91 U. S. 29.

In the *Connolly* case, the Pipe Company brought suit on promissory notes for pipe sold to Connolly. The defense was that the plaintiff had entered into a combination in restraint of trade and had thereby prevented competition and controlled prices. The court held that the transaction involved was an innocent one and collateral illegality could not be examined:—

> "If, according to the principles of the common law, the Union Sewer Pipe Company could not have sold or passed title to any pipe it received and held for sale, because of an illegal arrangement previously made with other corporations, firms or companies, a different question would be presented. But we are aware of no decision to the effect that a sale similar to that made by the present plaintiff to the defendants respectively would in itself be illegal or void under the principles of the common law. The contracts between the plaintiff and the respective defendants were, in every sense, col-

lateral to the alleged agreement between the plaintiff and other corporations, firms or associations whereby an illegal combination was formed for the sale of sewer pipe." (184 U. S. at 549: See also opinion p. 545.)

The Court thereupon proceeded to apply the same ruling to a defense set up under the Sherman Act. (P. 550.)

In *Small Co.* v. *Lamborn Co.*, 267 U. S. 248, 252, this Court noted:

> "It is only where the invalidity is inherent in the contract that the Act may be interposed as a defense. With that exception the remedies which the [Anti-trust] Act provides for violations of it are exclusive."

And, in 1934, Mr. Justice Brandeis again approved the doctrine of the *Connolly* case in *Loughran* v. *Loughran*, 292 U. S. 216, 228, stating:

> "By the long line of cases following Connolly v. Union Sewer Pipe Company, 184 U. S. 540, it is settled that illegality constitutes no defense when merely collateral to the cause of action sued on. A 'person does not become an outlaw and lose all right by doing an illegal act'. National Bank & Loan Co. v. Petrie, 189 U. S. 423, 425."

*Wilder Mfg. Co.* v. *Corn Products Ref. Co., supra,* is an action for goods sold and delivered. The defendant alleged that the plaintiff was an illegal monopolistic combination and that it had unreasonably advanced the price of its products to the injury of the public. This latter allegation is similar to the defense here pleaded. This Court held the defense unavailable, saying in part:—

> "And this is but a form of stating the elementary proposition that courts may not refuse to enforce an otherwise legal contract because of some indirect benefit to a wrongdoer which would be afforded from doing so or some remote aid to the accomplishment of a wrong which might possibly result—doctrines of such universal acceptance that no citation of authority is

needed to demonstrate their existence, especially in view of the express ruling in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, applying them to the identical general question here involved." (236 U. S. at 172)

This case, at p. 174, announces "the familiar doctrine that 'where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes'," citing cases.

In *Geddes* v. *Anaconda Copper Mining Co., supra*, a judgment was sought declaring void a sale of certain properties to Anaconda on the ground that they were purchased pursuant to an illegal monopolistic intent and plan. This Court held that the remedies provided by the Sherman Act being exclusive, this suit could not be maintained. In *Farmers & Mechanics Nat. Bank* v. *Dearing, supra*, which involved certain state laws forbidding usury a similar ruling was made.

We believe that there is only one reported case in which the precise question at issue in the case at bar has been decided.

*Progress Corporation* v. *Green*, 163 Misc. (N.Y.) 828.

This was a decision of the Appellate Term of the Supreme Court of the State of New York, First Department. The purchaser of goods in the ordinary course of business, in an action against him for the purchase price, undertook to interpose the defense that the seller had discriminated against the buyer by sales to other customers in violation of the Robinson-Patman Act. In a per curiam opinion the Appellate Term decided that the defense was not maintainable and awarded judgment to the plaintiff on the pleadings. Upon the reasoning of these cases it would seem clear that the defense sought to be interposed in the instant case cannot be maintained. Both the legislative history of the Robinson-Patman Act and practical considerations of an

elementary character in the national economy strengthen this conclusion.

D. *The legislative history of the Robinson-Patman Act affords no foundation for the defense interposed.*

The Robinson-Patman Act differs not merely in its origin and purpose from the statutes embodying common law prohibitions against restraints on trade which were available as defenses to contractual actions. In addition, it has an affirmative legislative history, already noted, showing that during its consideration by the Congress remedies were proposed, of a less drastic nature than those sought by petitioner, for obtaining in a federal court the equivalent of any illegal price advantage accorded to a competitor. The Congress ultimately decided not to depart from the old rule of requiring a showing of injury as the basis for recovery. Though thus strikingly occupied with the enforcement question, the legislators did not once allude to any "common law" right to avoid all liability for goods received, nor did they remotely suggest such a drastic and uneven penalty in their new and comprehensive regulation of trade practices.[15] The Congress in enacting the Robinson-Patman Act decided to rely for its enforcement upon the Federal Trade Commission, and upon the federal courts in treble damage actions, in injunction suits and in criminal prosecutions. It did not intend to impose upon state courts the burden of developing Federal law in this pioneering field, nor to authorize any court, state or federal, to assess a drastic and uneven penalty not based on actual injury.

[15] In the Committee proceeding and on the floor of the Senate and House there were frequent references made to the available remedies for enforcement of th Act. Although some thought the remedies inadequate and others thought treble damage suits too severe, *not once* in the course of Congressional consideration was there any mention or suggestion that the Robinson-Patman Act might be pleaded in bar of a suit for the sales price of goods purchased. See, *e.g.*, 80 Cong. Rec. 9563-64, June 15, 1936; Hearings before House Judiciary Committee on H. R. 8442, H. R. 4995, H. R. 5062, 74th Cong., 1st Sess., pp. 219-21.

E. *Practical considerations militate against a construction saddling Federal and state courts with the burdens attendant upon such a defense as petitioner asserts.*

The size of the Record in the instant case will give the Court some idea of what an examination into alleged improper price discrimination entails. Petitioner asserts the proceeding was never completed. That is an unfounded charge since the trial judge proceeded on the theory that all relevant evidence should be allowed to go in before ruling on the facts or the law of the case and did not close the hearing until he was satisfied that both parties had presented all of their relevant evidence (R. 578). It does, however, emphasize that a state court, having jurisdiction to try actions on promissory notes, is not the place to try out the complex economic issues of substantiality of probable effect on competition, relative cost of supplying or selling groups of customers, or justification by meeting competition.

Resort to a federal court in treble damage actions is said by petitioner to be impracticable (Br., p. 26), although it has instituted against respondent this very type of action. The facilities of a state court are usually more confined, and altogether inadequate for dealing with the complex issues involved. Moreover, the burden on the court, of dealing with a defense of illegality under Section 1(a) of the Robinson-Patman Act, is far greater than the burden on the court in dealing with treble damage actions. This is because the complainant in a treble damage action is confined to proving actual damage to himself; on the other hand, the defense of illegality would require the court to deal with the much larger question whether price discrimination was shown which was obnoxious to any provisions of the Act.

By a curiously inverted application of the rule of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, the petitioner has sought to premise its defense upon the need for uniformity in the application of a federal statute. We submit that it is ob-

vious that the supervisory jurisdiction of this Court cannot control and give uniformity to the findings of federal and state courts throughout the country on the complicated factual issue of the probable effects of a price discrimination upon competition generally. Essentially the Federal Trade Commission must lead the way in interpreting the law and applying it.[16] The theory of primary jurisdiction, whether controlling here or not, as a matter of law, has a common sense foundation in the practical problems of the administration of justice. For example, *In the Matter of Standard Brands, Inc.*, 30 F.T.C. 1117, involved an investigation into alleged unlawful price discrimination by Standard Brands. The study required resulted in a transcript consisting of 4805 pages.[17] The cost study entailed in fixing public utility rates has ben deprecated as inconsequential compared to the problems of the "hazardous attempt at police" stemming from cost justification under the Robinson-Patman Act.[18] The development of a sound policy under an experimental law, "which presently will reveal its own defects and invite abandonment or amendment,"[19] cannot be achieved by the widely dispersed federal and state courts. These courts cannot be expected to develop the "mechanisms of control" in the course of fulfilling the vital but routine role of providing a forum where commercial paper may be enforced.

No court, state or federal, can develop a uniform and comprehensive interpretation of the Robinson-Patman Act, that will permit it to perform a useful function in regulating trade practices without at the same time hampering com-

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[16] Cf. *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426.

[17] See also *In the Matter of Goodyear Tire & Rubber Company*, 22 F. T. C. 232 (1936); *In the Matter of Standard Oil Company*, F. T. C. Docket No. 4389, decided October 9, 1945; and the respondent's printed cost study in *In the Matter of United States Rubber Company*, F. T. C. Docket No. 4972 (pending), for further illustrations of the complexities of cost justification.

[18] Walton Hamilton, *op. cit. supra*, p. 333.

[19] Walton Hamilton, *op. cit. supra*, p. 333.

petitive pricing, which is the essence of a system of free competition. The task of construction should rest primarily with the Federal Trade Commission. This is particularly true since under the first section of the Act the Commission is specifically authorized to exercise quasi-legislative functions in establishing permissible quantity discount limits. In this connection, it seems significant that when Mr. Smith, General Counsel for the respondent, was asked on the witness stand whether the Federal Trade Commission had been advised as to the respondent's system of discounts at the time that it was set up, counsel for the petitioner objected and the testimony was excluded. (R. 579) In printing the transcript of Mr. Smith's testimony as Appendix D of Petitioner's Brief, this item was perhaps inadvertently omitted.

The centralization of interpretative and administrative functions in the Commission does not prevent recovery by injured parties through resort to the statutory remedy in the federal courts. In fact, after the Commission had acted and resolved the complicated fact-law questions involved in such a proceeding, the controversy would be reduced to proportions which could be handled effectively by a trial court.

F. *Practical business considerations show that the Congress could not have intended to allow a defense of voidness, based on collateral Robinson-Patman Act violations, to a suit on promissory notes.*

The essence of commercial credit is ready collectability. That means that a defense premised on some collateral violation of the Robinson-Patman Act constitutes a serious threat to the system of commercial credit of the country. Any recalcitrant debtor could harass his creditor and endlessly delay payment for goods received by demanding the right to investigate the entire business structure of the seller, the nature of every sale to other buyers, and the circumstances under which those sales were made before he

could be required to pay his debt. The seller, furthermore, would be required to open his business records and establish cost justification, or the need to meet competition in collateral sales, to collect on a negotiable instrument. All this would be done in a suit to collect the purchase price of goods sold in a transaction untainted with illegality but involving a sale by a seller who is charged with departing from his customary and legal price schedules to grant another buyer an unlawful price concession.[20]

The practical impact upon ordinary commercial operations of permitting the defense here sought to be imposed to be made in a suit for the sales price of goods purchased in the ordinary course of business may be seen without elaboration. In the first place, the adequate exploration of the issues controlling and determining any violation of the Robinson-Patman Act impose formidable burdens. As already seen, the Act does not seek to confine one to doing business in a straight jacket. It recognizes, and its legislative history indicates, that the Congress desired to foster the giving of lower prices in response to different costs of manufacture, sale or delivery. However zealous a manufacturer may be in following the explicit and implicit statutory direction, to demonstrate his compliance would require extensive, highly detailed, and costly proof. In those cases in which the Federal Trade Commission, aided by its experfness in the field and its staff familiar with the intricacies of cost accounting, has ultimately concluded that violation did not exist, it has found it necessary to have the most comprehensive data developed by the seller concerned.

With issues thus ranging as far afield as comparative costs of manufacture in one or more factories, conditions

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[20] Petitioner's contention necessarily assumes that the lowest price charged any customer is the seller's only legal price, since it is asking this Court's aid in obtaining that price. But it would be more plausible to hold that the seller's legal price, on the assumption that he can have but one, is the price at which he customarily sells, and that only the departures from that price are illegal. On this basis the petitioner is asking this Court's aid in obtaining an illegal price.

in two or more markets at particular times, differences in the cost of selling various classifications of customers—any one of which comprehends not merely the transactions with a complaining buyer, but may embrace the entire business of the seller—it is apparent that in many instances the cost of demonstrating compliance with the statute would far exceed the amount in suit.

Even in the case of an admitted violator of the Act, recognition of petitioner's position that such violation renders the transaction void and defeats recovery for the sales price would in effect convert the Robinson-Patman Act into the most drastic forfeiture statute yet presented to this Court. In sales to a particular customer totaling $100,000, an alleged discrimination of 5 per cent would amount to $5,000. Yet on petitioner's theory the illegality of the transaction defeats recovery for an amount twenty times the amount of the discrimination. Moreover, if the giving of a higher price to one customer renders all sales to all other customers at higher prices wholly illegal, the penalty for violation would thus run many hundred-fold the amount of the discrimination.

These direct consequences of the view here asserted by petitioner can lead only to the withdrawal of credit. If there is one thing that is clear it is that the Robinson-Patman Act was meant to aid the small merchant in competing against the chain. The petitioner now seeks to forge a weapon that will strike at the heart of commercial credit, and at small business. Once the certainty of collection on goods sold on credit is destroyed, many sellers would have but one recourse. That recourse will be a refusal to extend credit. Only in that way can a lengthy trial, resembling a public utility rate proceeding, in an attempt to collect the purchase price, be avoided. For the larger companies, and those having a large borrowing power with local banking institutions, the termination of sales on credit will involve no hardship. It is the small business enterprise, and especially one that is just entering the field or engaged in expansion of its operations, that will be seriously weakened. Bruce's Juices, though not small, would likewise have been

greatly handicapped by the development of a business policy refusing it credit. When it pioneered in the small can field in 1936-1937, it had available a generous line of credit which will be shut off to it hereafter by every can manufacturer if the defense it is urging is held to be available. It is unbelievable that the Congress which passed the Robinson-Patman Act intended to shut off the efforts of new concerns to enter the competitive field, or of small concerns to expand their activities and grow financed in part by credit obtained from their suppliers.

## II. The court below properly ruled that on the facts developed in the pretrial procedure the summary entry of judgment should be affirmed.

### A. *There was no departure from accepted State Practice in the proceedings below.*

The taking of testimony as part of a pre-trial procedure and upon respondent's motion to strike or compel amendment is in accord with the settled practice of the Florida Courts, duly authorized by the State Statutes and by the court Rules. The effort of the court is directed toward defining the issues and ascertaining whether the complaint or pleas interposed have a foundation in fact. In the event that no relevant substantiation can be advanced in support of the complaint, on the one hand, or the pleas, on the other, summary judgment is entered.

Fla. Stat. 1941, §50.21, 50.27, 50.30, 90.17, 90.18, 90.19;
Rules 22, 27, 54, Florida Rules of Practice (122 Fla. 881-890);
Order of the Supreme Court of Florida entered January 12, 1940, establishing Pre-Trial Procedure (141 Fla. 327);
Order of the Circuit Court for Hillsborough County entered June 21, 1940, adopting the rule for Pre-Trial Procedure;

*Hillsborough County* v. *Sutton*, 8 So. (2d) (Fla.) 401;
*Brash* v. *Ehrman*, 56 Fla. 153, 47 So. 937;
*Rhea* v. *Hackney*, 117 Fla. 62, 157 So. 190, 194.

In the case at bar the respondent interposed a motion to strike or to compel amendment of the pleas. The nature of the charges contained in petitioner's pleas apparently suggested to the trial court the desirability of utilizing the pre-trial procedure for determining the real nature of petitioner's grievances. (R. 4-13; 57.) After all relevant evidence had been taken, the record contained no showing that the Robinson-Patman Act had been violated by respondent. Accordingly, the Florida Supreme Court entered judgment on the facts for respondent in keeping with Florida practice which does not require submission of the case to a jury under these circumstances. *Hillsborough County* v. *Sutton*, 8 So. (2d) (Fla.) 401. A similar practice of entry of summary judgment on the basis of affidavits or interrogatories is well known in federal courts. The affirmance by the Florida Supreme Court of the judgment entered by the trial court obviously involved approval of the procedure by which the judgment had been obtained.

The charge that the procedure followed was improper under state practice does not present a federal question. Couching this argument in terms of preventing abridgement of "a right established by federal law" through "serious departure from the ordinary requirements of proper process in a state court" adds nothing. (See Pet.'s Br. p. 10.) There is no federal right more fundamental than the constitutional right to due process of law, but that does not relieve petitioner of the obligation to raise what is essentially a due process objection in the court below. A federal due process objection must be specific. *Thomas* v. *Iowa*, 209 U. S. 258, 263. None whatsoever was interposed in petitioner's application for rehearing,[21] in its assignment of errors, or at any other stage below.

Moreover, even if the due process question had been injected into this case, a jury trial is not a prerequisite of due

[21] The application of petitioner for rehearing was not designated for printing, but an examination of it shows no claim of deprivation of rights under the Fourteenth Amendment by the proceeding below.

process in State Courts. *Wagner Co.* v. *Lyndon*, 262 U. S. 226, 232. And it is certainly not necessary state procedure to submit issues of fact to a jury when a trial court, or an appellate court acting on the record, has become advised under appropriate procedure that judgment must in any event be summarily entered.[22]

Petitioner's reliance on the allegations of the pleas as a basis for asserting that the issues should not have been determined is unwarranted. A complete and lengthy hearing was held to afford petitioner an opportunity to support those pleas with evidence or have judgment entered against it. The vague charges of the reluctant debtor in its pleading have lost all legal significance. Such are the unsupported charges that closing equipment was furnished without charge to larger customers than Bruce, or that freight equalizations were not offered uniformly on particular cans to respondent's factories, or in other legitimate ways to meet competition. These charges were made without evidence to support them, though as will be noted *infra*, petitioner was seeking to obtain exceedingly valuable trade information in a highly competitive industry on the pretense of searching for such evidence.

B. *No unlawful discrimination occurred in the sale of small cans.*

An examination of the unchallenged facts produced in evidence demonstrates that there was ample basis for the court's conclusion that no discriminatory practices on the part of the respondent had been shown.

In the small can field,—the individual service can,—proof of probable substantial effect on competition was specifi-

[22] It is clear in this case that the appellate court was convinced that the evidence was such as to require summary judgment. There was no need for it to make findings of fact, or have the trial court make them. That is entirely a matter of local procedure and state practice in expediting litigation.

cally and exclusively directed to competition in the south, particularly in the New Orleans area, with a smaller company, Engleman Gardens, a Texas competitor of petitioner operating a cannery some distance from Houston, Texas. (R. 66.) Engleman packed grapefruit juice and marketed it as "One-Up" in the New Orleans area. (R. 120, 395.) This Texas company packed its juice in 1940 in a 5¾-ounce can. (R. 387.) The distributor of petitioner's 6-ounce juice, grapefruit and others, met competition and was forced to exert extra effort to sell his product. (R. 387.) The 5¾-ounce can, without extras for lithographing, was supplied at a price of $9.68 per thousand, f. o. b. Houston, where the can was manufactured by respondent. (R. 544.) At the same time petitioner was sold the 6-ounce can, on which it had standardized because of the advantages in competitive selling, at $10.14 per thousand, f. o. b. Tampa. (R. 65.)[23] Petitioner's contention was that the $9.68 price offered in September, 1939 (R. 182), for sales of cans which first took place in 1940 (R. 544, 565) was discriminatory because it represented too large a differential from the current price of the 6-ounce can. It was contended that the 5¾-ounce and 6-ounce cans were the same because the consumer ultimately paid the same price for the *fruit juice* packed in the two different cans. (R. 68.)

Assuming for a moment some sort of unlawful discrimination as a result of this price differential on cans offered for sale in September, 1939 and first sold in 1940, it is apparent that the sales transactions which gave rise to $102,000 of the indebtedness composing the subject matter of the suit were entirely free and clear of any taint of illegality from the sale of small cans. For that portion of the indebtedness had arisen, and the sales represented by it had occurred, prior to September, 1939 and prior to the controlling date of sale of the 5¾-ounce can at $9.68 beginning in 1940. Although there is reason to believe (R. 88, 90) that the transactions represented by the $12,000 note

[23] Petitioner last used the 5¾-ounce can in January, 1939. (R. 379.)

also occurred in 1939, that is not clear. (R. 579.) Only as to this portion of the indebtedness is the question of possible illegality in the small can field of significance.

But, even as to this small amount, petitioner's proof fell short. The freight paid by Engleman to ship the 5¾-ounce can to its Texas cannery from Houston where the can was manufactured brought the total delivered price to $10.18 per thousand to Engleman (R. 66), as compared to the $10.14 price paid by petitioner for the 6-ounce can sold f. o. b. Tampa, where it was manufactured. Under the Act the probable effect on competition must be measured by the can cost to the competing canners.[24] Petitioner got its individual serving cans at $10.14. Engleman got its smaller individual serving cans at $10.18. Petitioner is in no position to complain of discrimination.

Furthermore, the undisputed evidence shows that the additional amount of tin plate in the 6-ounce can alone cost the respondent around fifty cents per thousand. (R. 541, 542.) This amply demonstrates what was apparent all along, *i. e.*, the two cans are not the same product, and there was therefore no obligation upon respondent to charge the same price. Indeed, the evidence adverted to discloses that the additional cost of producing the larger can would make it economically impossible to charge the same price as that charged for the smaller container. It is true that the 5¾-ounce can of fruit juice was sold competitively against the 6-ounce can of fruit juice. That does not make the two cans supplied the canners the same product. Indeed, it does not even make the packed fruit juice the same product so as to require the same selling price. The OPA has recognized that both cans and canned products of varying sizes must be separately priced.[25] Surprisingly enough, this

[24] Cf. *Corn Products Co.* v. *Federal Trade Commission*, 324 U. S. 726; *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746.

[25] See Maximum Price Regulation 350, C. F. R., Title 32 Ch. 11, Part 1306; Food Products Regulation 1, Supplement 13, C. F. R., Title 32, Ch. 11, Part 1351.478.

claim of discrimination in the small can field was the heart of petitioner's complaint when reduced to concrete form by the pre-trial proceeding.

Petitioner also asserted illegality grounded on a failure to quote it a price of $9.68, f. o. b. *Tampa* on another size can. This was a somewhat smaller individual serving can. Respondent quoted it a price of $9.68 f. o. b. *Baltimore*, the nearest factory where respondent produced it. (R. 285.) The Robinson-Patman Act does not require that respondent equalize or absorb the freight to its own factory at Tampa on a product which it manufactures and sells at Baltimore. This second can was never manufactured at Tampa. (R. 545.) When the respondent sold this same can to another customer in Florida, the customer was obliged to pay freight from Baltimore to Tampa. (R. 548.)

As to the quantity discount on the small cans we do know this: that, of the total indebtedness, $102,000 arose before September, 1939. (R. 579-580.) We also know that the balance of $12,000 probably arose before then as well though it may have arisen a little later.[26] But petitioner has not shown that any indebtedness arose after June of 1940, even on the $12,000 note.

Up until the time this debt was all incurred, in the small can field the only proof made of probable substantial effect on competition was in the competitive battle against Engleman Gardens and its "One-Up" grapefruit juice of the 5¾-ounce size. Engleman received no quantity discount[27] and we have shown that there was no illegal discrimination in the differences of price. There were some larger purchasers of cans who received quantity discounts and who purchased small cans, but they did not purchase small cans

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[26] (R. 579.) Accepting this record reference, though Mr. Bruce twice testified to an earlier origin of the indebtedness (R. 88-90), petitioner has not established that any indebtedness arose after June of 1940.

[27] What is more, since Engleman did not object, all of its transactions with American Can were offered for petitioner's inspection. See Petitioner's Brief, Appendix C, p. 59, for one such offer.

until *after all the indebtedness involved in this law suit had arisen.*[28] There were no quantity discounts given for purchases of small cans during the period when the instant debt was incurred except, in one year, to petitioner itself. (R. 469.)

It appears that the charge of discrimination in the sale of individual service cans was disproved both as to the alleged discrimination in the named prices and in respect to the quantity discount. Thus petitioner's entire claim of discrimination so far as it relates to the individual service cans falls to the ground.

C. *Since there was no illegal discrimination as to individual service cans and since petitioner failed to identify the portion of its indebtedness arising out of sales of other than individual service cans, respondent was entitled to summary judgment.*

A cardinal fact that must not be forgotten in this case is that petitioner has not established what sales transactions are represented by the current indebtedness. Petitioner's president testified that the indebtedness represented can purchases in a "blanket way." (R. 373, 374.) Some purchases were paid for by cash; others were credit sales. As already seen, petitioner's charges of discrimination collapsed with respect to the individual small service cans. This was its principal charge. Insofar as the grocery size cans are concerned, the facts adduced by petitioner on issues it had to support fell completely short of prima facie proof. Petitioner did not establish what part of the present indebtedness arose from the purchase of these grocery size cans.

There was no discrimination shown in the sale of any small can currently being purchased by Bruce's Juices.

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[28] Libby, McNeill & Libby and Morgan Packing Co. are the discount customers who bought small cans. Their purchases were all after the indebtedness arose. (R. 226.) Nor was there the slightest effort to show any probable lessening of competition, as there was in the case of Engleman.

There was no discrimination in sale of the 6-ounce can. And there is no showing what part of the indebtedness is represented by purchase of other cans. Petitioner has never so much as suggested that it can show what part of the debt represents transactions involving sales of grocery cans. It totally failed to produce such proof.

Whatever the situation, petitioner cannot escape this burden of showing that the indebtedness represents cans on which it paid a greater amount than that charged by respondent to other customers and that that constituted illegal discrimination. Petitioner would otherwise be asking for a rule of law that once there had been discrimination the seller could not collect money due it from a sale of an item *having no counterpart in a sale to another of the same item at a different price.*

The consequence of this state of the record is that summary judgment was the only action logically possible. Petitioner's pleas do not ask for a rule ostracizing a violator from ever collecting the purchase price of one product from a person to whom a sale of another product may once have been made at a price discriminatorily high. Petitioner's pleas rather sought to spell out that the transactions forming the basis for the notes were discriminatory sales. But petitioner has not established this. And no animadversions against respondent can supply this basic defect of proof on this issue as to which it is conceded petitioner had the burden.

D. *Respondent's quantity discounts were justified and were not improper discrimination.*

Even if Bruce's Juices had shown what part of the debt was represented by its purchases of grocery cans, so as to make the question of quantity discounts of relevance in this case, no illegality would have been established. This is true, first, because no substantial effect on competition was shown by Bruce's Juices as being the result of the discounts actually granted; second, because the quantity discount

schedules of the respondent were justified under the express terms of the statute.

By way of showing that the discounts on cans had a substantial effect on petitioner's sales of fruit juice to the grocery trade, petitioner stated that it competed in the grocery field with certain customers who received quantity discounts on its can purchases. (R. 506.) The nature of this competition with the large packers was on a price basis. It is not shown that petitioner's business in grocery cans fell off, or that its competitor's business increased. It is not shown that the canners in Florida decreased in number, or that they packed less juice. In fact, the opposite is actually the case.[29] This effect of substantial injury to competition is a *sine qua non* to illegal discrimination. Petitioner did not show that any injury resulted and that that injury could be attributed to respondent's discounts. In fact, in one of the years, 1939, when the indebtedness arose, petitioner was itself a discount-receiving customer. In view of the failure of proof of this statutory requisite of violation, examination of respondent's cost justification is largely unnecessary.

As to the justification of the discount schedules, apparently petitioner in its brief has overlooked the fact that the cost data supporting the discounts granted to the various classes of customers is part of the Record before this Court. The clerk of the court below inadvertently failed to transmit them to this Court in the first instance and therefore they do not appear in the printed Record. However, they

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[29] In spite of the fears expressed in petitioner's brief of "concentration of economic wealth" unless the defense of illegality is allowed, without such a defense the number of canners in Florida increased from 67 in 1936 to 77 in 1939; the canners of grapefruit juice, from 33 in 1936 to 45 in 1939; the canners of orange juice, from 11 in 1936 to 35 in 1939. CANNER'S DIRECTORY (1936, 1939 ed.). The pack of grapefruit juice in Florida increased from 1,608,287 cases for the 1935-36 season to 4,916,312 cases for the 1938-39 season. CANNED FOOD PACK STATISTICS: NATIONAL CANNERS ASSOCIATION. The citation of the amount of profit in a case of canned goods involved in the 1930 *Ladoga* decision is not indicative of probable effect on competition for purposes of the instant case.

were later certified and filed with this Court under Rule 10. (Plaintiff's Exhibits 2 to 14 inclusive.) There is no basis for petitioner's charge that the discounts, based on savings in selling costs, were founded on speculation and estimates. As Mr. Smith testified, when the Robinson-Patman Act was passed, the discounts then being granted were larger. Although they were legal under the Clayton Act, it was felt they might not be justified under the Robinson-Patman Act. The business experience of the Company made it aware, however, of the fact that it cost less to sell the large accounts than the small ones. Cost studies were made at great expense and these differences in selling costs were established by day to day recording of every item of selling expense which was incurred. There is no basis for saying the Company "fell back . . . upon a system of cost accountancy which . . . rested upon no more secure foundation than hypothesis" (Petitioner's Brief, p. 33). The Company compiled actual data of costs of selling the various classes of customers. The charts submitted broke down the various items of cost and gave the figures both in dollars and in percentages. These charts are Plaintiff's Exhibits 5 to 14. There is no occasion for petitioner's characterization of the cost accounting justification as "made-to-order" (Petitioner's brief, p. 37). The Act contemplated and in fact demanded that such cost studies be compiled and be available to justify quantity discounts.[30]

Petitioner objects because of the classification of customers. Petitioner cannot contend that separate costs of selling must be computed for each customer. It is difficult to see how petitioner has any standing to complain because of the averaging of costs, since the uncontradicted evidence in the present Record reveals that the relative cost of selling and servicing petitioner exceeded that of any other customer. (R. 513, 531, 536.)

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[30] "The Robinson-Patman Act is the law of the land. Trial is to proceed by the ordeal of cost accountancy." Walton Hamilton, *op. cit. supra*, p. 323.

The petitioner also contends that the information supporting the cost studies was not made available in New York and that the trial court did not pass on the certified questions which various witnesses had declined to answer. The trial court allowed all relevant evidence to be introduced. It did not fall in line with plans to harass respondent and require production of confidential business information relating to the business of petitioner's competitors. Counsel for respondent made this formal offer: "The plaintiff will make the records of the company available to the defendant's auditors for the purpose of examining the details listed in Exhibits 5 to 9 for identification." (R. 238.) These exhibits contained the figures in dollars and in percentages of all sales expense incurred for each class of customer. Counsel for petitioner answered: "All right, we will arrange the detail on that." Petitioner's counsel then asked, further, to see the individual accounts of each and *every* customer to determine the accuracy of sales figures in Exhibits 10 to 14. (R. 239.) Counsel for respondent replied that the company would permit an examination of its records relating to Exhibits 10 to 14 so far as it would be permitted to do so by its customers. (R. 239.) Further than this, the auditor who had prepared these exhibits was then on the stand prepared to testify as to their accuracy. The petitioner's counsel immediately lost interest. (R. 240.) It is difficult to see how the acounts of every customer of respondent for the years 1936 to 1942 could have been checked if petitioner was unwilling to take the time to check the sales expense supporting documents.[21] This Court cannot be asked to assume the function of policing the exclusionary rules of the state courts nor the discretionary power of state judges. The appellate judges, deciding this case on the

[21] The harassing nature of the request to check customer accounts is emphasized by the failure to confine the request to the period when the indebtedness arose. It is not respondent's good faith that should be questioned. The tactics employed were designed to harass, not to secure information and verification.

facts had the right to rule out harassing tactics designed to delay resolution of a case for months.

The broader objection to the discount plan is grounded on the differences, however small, in serving individual customers. Petitioner argues that respondent's justification "disregarded the actual expense of serving individual purchasers of cans." (Brief, p. 33) It also asserts that, in five cited cases,[32] the Federal Trade Commission has held that "this price system [of respondent's] on its face violates the prohibition of the Robinson-Patman Act." There is no basis for this assertion of criticism by the Federal Trade Commission.

The Robinson-Patman Act was never intended, and has never been interpreted, to have the result of requiring as many separate discounts as a seller has customers to take care of differences in selling costs, however slight. The Act nowhere precludes volume discounts as such. The legislative history of the Act is replete with evidence of the intent and purpose of Congress to permit the continuance of volume discounts that "make only due allowance for differences in the cost of manufacture, sale, or delivery, resulting from the differing *methods* or *quantities* in which such commodities are to such purchasers sold or delivered." [Emphasis added] It was the intent and purpose of Congress that these words should have meaning. Differences in selling cost between individual customers arising from other causes than differing methods or quantities in which the goods are sold or delivered, can not avail to justify differences in selling price to such customers. The House Committee Report stated:

> "Any physical economies that are to be found in mass buying and distribution, whether by corporate

[32] *In the Matter of H. C. Brill Company, Inc.*, 26 F. T. C. 666 (1938); *In the Matter of Master Lock Company*, 27 F. T. C. 982 (1938); *In the Matter of American Optical Company*, 28 F. T. C. 169 (1939); *In the Matter of Simmons Company*, 29 F. T. C. 727 (1939); *In the Matter of John B. Stetson Company*, Docket No. 5172. In not a single one of these cases did the seller offer a cost justification of its discounts.

chain, voluntary chain, mail-order house, department store, or by the co-operative grouping of producers, wholesalers, retailers, or distributors—and whether those economies are from more orderly processes of manufacture, or from the elimination of unnecessary salesmen, unnecessary travel expense, unnecessary warehousing, unnecessary truck or other forms of delivery, or other such causes—*none of them are in the remotest degree disturbed by this bill . . .*" (H. R. No. 2287, 74th Cong., 2d Sess., p. 17) (Emphasis added.)

They would indeed be disturbed—in fact would be precluded altogether—if there can be no averaging of costs to different volume groups, and if, as between any one purchaser and any other, the seller must be able to prove, on penalty of being unable to enforce payment of a just debt, the precise cost difference of selling to the two from whatever cause arising. But the same House Report also stated that the Act permits price differentials based upon cost differences that can be shown to exist "between the customers or *classes of customers concerned.*" (H. Rep. No. 2287, 74th Cong., 2d Sess., p. 10.) (Emphasis added.) And this has consistently been the interpretation of the Robinson-Patman Act by the Federal Trade Commission, the agency primarily charged with its enforcement.

In the *Goodyear* case[33] the Commission accepted a cost study which compared the cost of selling Sears, Roebuck and Company with the *average* of the cost of selling to independent tire dealers, and it permitted to be averaged the items of direct selling expense used in respondent's four-year cost study. Moreover, it announced as the basic and realistic principle which the Commission has followed in enforcing the Robinson-Patman Act that

> "a discount is not to be condemned merely because it does not mathematically accord with cost differences.

[33] *Matter of Goodyear Tire & Rubber Co.*, 22 F. T. C. 232 (1936). On appeal the case was dismissed as moot, *Goodyear Tire & Rubber Co.* v. *Federal Trade Commission*, 92 F. (2d) 677 (C. C. A. 6, 1937), but was reversed by this Court, *s. c.* 304 U. S. 257. See, also, *Goodyear Tire & Rubber Co.* v. *Federal Trade Commission*, 101 F. (2d) 620 (C. C. A. 6, 1939), cert. den. 308 U. S. 557.

The problem is a practical one and must depend on the effect and intent of the scheme as a whole." (pp. 329-30)

In the *Kraft-Phenix* case[34] the Commission sustained discounts, ranging up to 10% on the averaged differences in the cost of delivery to purchasers of different volumes. In the *Bissell* case[35] the Commission dismissed, on the basis of a similar cost justification, a complaint involving annual quantity discounts to different groups of purchasers. The minimum and maximum discounts examined were three times the minimum and maximum quantity discounts of respondent, and dismissal was grounded on the Commission's finding that "respondent's justification . . . on the basis of different service costs for the different *classes of purchasers* paying the different prices" satisfied the Act. In these cases the Commission sustained volume discounts, in whole or in part, on a cost justification *as between classes of customers*. In other cases, though finding the particular cost justification inadequate, it has never impugned, and has by clear implication approved, the averaging of costs as among classes of customers. *In the Matter of Standard Brands, Inc.*, 30 F. T. C. 1117 (1940); *In the Matter of Standard Oil Company*, F. T. C. Docket No. 4389, decided October 9, 1945.[36]

Petitioner's objection to the respondent's cost justification comes down to one point. This is that the no-discount

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[34] *In re Kraft-Phenix Cheese Corporation*, 25 F. T. C. 537 (1937).

[35] *In re Bissell Carpet Sweeper Co.*, F. T. C. Docket No. 4636, March 6, 1945.

[36] Obviously a seller cannot charge to any one of his discount groups the whole or any part of the expenses incurred in selling to another group. This the respondent has not done. Nor can a seller charge to any one group a disproportionate share of an item, such as home-office overhead, which is deemed by the Commission to be allocable per sales dollar to all sales. *In the Matter of Goodyear Tire & Rubber Co., supra; In the Matter of Standard Brands, Inc., supra.* For this reason the respondent did not include home-office overhead in the expenses which it distributed among its discount groups.

group as a group was charged with commissions paid on purchases by customers in that group, although no such commissions were paid in Florida. The argument is that petitioner is being charged with commissions not actually paid on purchases by him. There are three answers to this point.

In the first place, petitioner's purchases were not confined to Florida, and for aught that the record shows commissions were paid on his purchases outside of Florida, the volume of which he has not shown.

In the second place, "commissions" were one of the items of expense that the Federal Trade Commission in the *Goodyear* case allowed to be averaged among all independent tire dealers, without a showing that they were paid proportionately on sales to all such dealers. In short, a member of a legally determined discount group may properly be charged with his proportionate share of the total selling costs for that group, even though particular expense items may not have been incurred in connection with particular sales to him. The legal approach is still "a practical one."

In the third place, respondent's discount system would remain valid, even if the item of commissions were omitted in the calculations; and this is the only item of the costs charged to the no-discount group that the petitioner attacks. The Act requires only that "due allowance" be made. Omission of item of commissions would not significantly affect the justification.[37]

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[37] The commissions charged to the no-discount group totaled $108,390.36 in 1938, out of total expense of $2,280,465.44 charged to that group; $76,498.95 in 1939, out of total group expense of $2,325,196.20; $123,715.02 in 1940, out of total group expense of $2,470,438.86; and $126,316.73 in 1941, out of total group expense of $2,514,736.02. (Plaintiff's Exhibits 6-9.) The complete omission of this item of commissions would have reduced the percentage of selling expense to sales, for the no-discount group (as shown on Plaintiff's Exhibits 11-14) from 5.98 per cent to 5.703 per cent in 1938; from 6.598 per cent to 6.382 per cent in 1939; from 6.876 per cent to 6.532 per cent in 1940; and from 5.718 per cent to 5.431 per cent in 1941. The savings in selling costs to the 5 per cent discount group, as compared with the no-discount group, would ac-

Thus the record makes it clear that the determination of the Florida Supreme Court was correct that "on the facts" in this case no showing of violation of the Robinson-Patman Act could be made. The lack of identification between the renewal notes and any specific sales transactions, the fact that the debt arose almost wholly prior to the time of any alleged discriminatory sale to others, and the absence of any showing of violation either as to small cans or grocery size cans was called to the Court's attention (R. 614-16) and is uncontradicted of record. And if in this absence of any proof of violation, it had been deemed necessary to refer to respondent's cost justification, likewise fully before the Court, this three-year study abundantly showed the complete validity of the discounts as applied to the grocery size cans.

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cordingly have been reduced from 5.396 per cent to 5.112 per cent in 1938; from 6.098 per cent to 5.882 per cent in 1939; from 6.321 per cent to 5.977 per cent in 1940; and from 5.308 per cent to 5.021 per cent in 1941. Similarly, the average savings in selling costs to all discount groups, as compared with the no-discount group, would have been reduced from 5.161 per cent to 4.877 per cent in 1938; from 5.977 per cent to 5.761 per cent in 1939; from 6.207 per cent to 5.863 per cent in 1940; and from 5.119 per cent to 4.832 per cent in 1941. Even without the item of commissions, the savings in selling expense to the 5 per cent discount group, as compared with the no-discount group, thus in all instances exceeded the discounts paid to that group; and the average savings in selling expense to all discount groups, as compared with the no-discount group, in all instances exceeded the total amount paid in discounts.

The figures on Plaintiff's Exhibits 11-14 can easily be broken down, by reference to the data on Plaintiff's Exhibits 6-10, so as to show the average of the savings in selling costs to the intermediate discount group of 1 per cent, 2 per cent, 3 per cent and 4 per cent. If this is done, then for these four groups the percentage of selling costs to sales was .964 per cent in 1938, .687 per cent in 1939, .729 per cent in 1940, and .733 per cent in 1941. Thus, again disregarding the item of commissions charged to the no-discount group, the average in savings of selling costs to the four intermediate discount groups, as compared with the no-discount group, would have been 4.739 per cent for 1938, 5.695 per cent for 1939, 5.803 per cent for 1940, and 4.698 per cent for 1941. The total average savings for the four intermediate discount groups in each instance exceeded the maximum discount of 4 per cent that was paid to any one of such groups.

## CONCLUSION.

For the foregoing reasons the judgment below should be affirmed.

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NO. 27

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946

SUPPLEMENTARY BRIEF FOR THE RESPONDENT
ON REARGUMENT

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946.

No. 27.

BRUCE'S JUICES, INC., *Petitioner,*

v.

AMERICAN CAN COMPANY, *Respondent.*

*ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA.*

## SUPPLEMENTARY BRIEF FOR THE RESPONDENT ON REARGUMENT.

The broad scope of the petitioner's, Bruce's, claims, both in its petition and in its main brief on the merits, seemed to require the particularized and detailed answers made by the respondent, American, in its main brief. The developments on the oral argument indicated that the issues involved were actually much narrower in scope. Because of this, we believe that it may be helpful to the Court to re-state these narrower and controlling issues and thus to clarify the argument. This brief, is, therefore, submitted on reargument as supplementary to respondent's original brief.

### INTRODUCTORY.

Bruce's position is this: From 1936 through 1942 it purchased many hundred thousand dollars worth of

cans from American. For some of these it paid cash; for others it paid part in cash and part in notes. At Bruce's repeated request, the notes were continuously extended; from time to time some of them were paid in whole or in part by Bruce or by the crediting of annual refunds by American; from time to time various notes were consolidated in aggregated renewal notes; and, eventually, the remaining indebtedness was consolidated in the four renewal notes amounting to approximately $114,000 involved in the two suits here consolidated.

When sued in 1942 Bruce pleaded that the four renewal notes were wholly void.[1] This defense was based on the allegation that throughout the six-year period from June 1936 to 1942, American had sold at discriminatory prices to other customers. The most serious of these charges was that American throughout the six-year period used a uniform quantity discount system under which customers were classified and discounts determined according to total annual volume of purchases. This Bruce alleged was in violation of the Robinson-Patman Act and rendered the notes void.

There are thus but two issues presented by the present record. The first we believe is of major importance. It is likewise simple. Can a purchaser of goods on credit, who has used them but refuses to pay for them, set up as a defense that the seller charged, in separate sales to third parties, prices different than those

[1] Eight of the ten pleas in Bruce's answer assert that "The consideration for said note(s) is illegal and said note(s) [are] *void* and of no force and effect." (See R. 4-13, 41-46). Two of the pleas asserted a further defense of conditional delivery. On this defense the lower court specifically found against Bruce (R. 581-582), and it is not urged in this Court.

charged him? If so, a simple action for recovery on a debt is converted into a complicated, costly, and prolonged anti-trust proceeding.

This is the first and a controlling issue tendered by this record. Bruce asserts that the statute must be interpreted to mean that because American sold to others at lower prices during the period in which its debt arose,[2] the sales to it are "prima facie illegal" under the Robinson-Patman Act. This it says is a complete defense because the alleged violation makes the sales transaction void. Thus irrespective of injury to it, it need not pay its debt.

We submit that this argument distorts the statute. Violation lies not in *any single sale* but in two or more sales to different people which together have particular effects upon competition. These required effects on competition were carefully specified by Congress—and simply selling one man at a higher price than another is not of itself a discrimination, let alone a violation of the Act. The prohibited effects must also be proved.

Even where a complete violation of the Robinson-Patman Act is properly pleaded—that is, price differences, in two or more different transactions, with discriminatory results, and the requisite effect upon competition—we submit that under settled decisions of this Court, and everywhere followed, these allegations cannot be pleaded as a defense in a suit to collect the price of the goods sold. The wisdom of this settled rule

[2] As pointed out, *infra* pp. 33-36, Bruce in the present case cannot tie up any sales transaction with the renewal notes sued on. No single sale is identified. Bruce's position is simply that the "prima facie" illegality alleged as to some transactions renders these notes wholly void even though they are the merged remaining unpaid balance on at least six years' purchases.

is vividly seen in this case. Any other rule will impair the ready granting of credit to all types of business enterprises both large and small.

The second issue presented by the record is whether, assuming that a violation of the Robinson-Patman Act may be pleaded to avoid an admitted debt, Bruce made out enough of a case in the pretrial proceeding to warrant the prolonged trial necessary. Under Florida practice, as applied by its Supreme Court, its failure to do so was held sufficient to warrant summary judgment. We think it clear that an examination of the 625 pages of this record, and the exhibits which separately accompany it, shows that the judgment of the lower court was right and must be affirmed.

**I. THE DEFENSE IS NOT AVAILABLE UNDER THE ROBINSON-PATMAN ACT, AND EVEN A FULLY PLEADED VIOLATION OF THAT STATUTE CANNOT UNDER REPEATED DECISIONS OF THIS COURT BAR RECOVERY OF THE PURCHASE PRICE: ANY OTHER RULE WOULD TURN A SIMPLE DEBT ACTION INTO A PROLONGED ANTITRUST SUIT AND WOULD DAMAGE COMMERCIAL CREDIT.**

The simple way to focus on the key issue—whether this novel defense is to be allowed—is to examine the pleas entered by Bruce when sued on the notes. (R. 4-13, 41-46.) The two declarations, consolidated in this case, recite the notes, the second one stating in detail the series of renewals, and that the indebtedness "was created prior to February 1st, 1940." (R. 1-2, 39-40.) Bruce did not deny that it purchased the cans, that it used them, or that the amount due was correct and unpaid. Instead, it filed ten lengthy, general pleas in one suit, and six in another. To illustrate: Bruce pleaded that the notes were given "*as part* of a transaction involving the sale of cans" and "*evidenced* the purchase price of said cans."[3] The transaction, it continues, was

[3] Except where otherwise noted, italics have been supplied.

"unlawful" because American "*directly and indirectly* discriminated in prices." The discrimination is specified merely by repeating the language of the statute. The plea concludes, "*therefore*, the *consideration* for said notes is *illegal* and said *notes void* and of no force and effect." (R. 4-5.)

In the second suit, after there had been a demurrer entered in the first and a motion made for compulsory amendment—both pointing to the inherent vagueness of these pleas—Bruce sought to particularize: It "alleges more particularly" that the sales to others by American were "from June 19, 1936, and continuously through and after February 1, 1940." (R. 41) It names the other purchasers as two canners in Texas, three companies operating nationwide, a company in Indiana, a large grocery chain, and a pineapple canner in Hawaii. (R. 46.) Bruce alleges that American sold to these customers—within the vague period stated—

> "at *lower prices* . . . [than those charged Bruce] during the *same period of time, the exact price, or prices*, at *which said cans were sold* to said purchasers and *the method* by which said prices were fixed and *the precise terms* of such sales to such other purchasers *being unknown* to the Defendant but known to the Plaintiff . . ." (R. 42.)

The same approach runs through the remaining pleas in both suits. For example, after claiming discrimination in furnishing closing machines—a charge which later collapsed—Bruce particularizes that

> "other facilities and services which were so furnished, and *the manner* in which they were furnished, and the *precise terms* on which any were furnished, *are unknown* to Defendant but known to the Plaintiff . . ." (R. 43.)

Of such material are the pleas here involved. On this basis the Court must determine whether the Robinson-Patman Act requires that any simple suit by a seller for the price of goods sold on credit (and consumed) can be turned by such pleas into a backhanded, comprehensive and costly inquiry under the Act into the seller's entire business operations.

Bruce's argument rests on the assumption that where a seller over a "period of time" sells to others at a lower price than he sells or has sold to one buyer, the transactions if in violation of the Robinson-Patman Act are *void*, and there can be no recovery of the entire purchase price.[4] (As will be seen this is wholly unfounded.) Bruce next states that where agreements are in themselves illegal under the Sherman Act, this Court has refused to permit their enforcement by either party. Since the Sherman Act is an "antitrust" law, and the Robinson-Patman Act an amendment of the Clayton Act, also an "antitrust" law, Bruce urges that the same rule of voidness and unenforceability must be applied. To buttress this broad syllogism, the argument is made that neither Government civil or criminal antitrust proceedings, nor treble damage suits, nor even the enforcement activities of the Federal Trade Commission are effective. Hence, it is concluded, the type of inverted proceeding here presented must be permitted to emerge in any ordinary lawsuit to collect the price of goods sold.

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[4] As we point out in our main brief (pp. 12-14), Bruce struggles vainly to avoid the full impact of its own argument: If the Robinson-Patman Act makes the sale to Bruce at a higher price wholly void, there can be neither recovery on the sales contract nor on any *quantum valebant* or fair value basis. (See cases cited, Respondent's Brief, p. 14).

We submit that this argument misreads the statute, that it misapplies decisions of this Court, and that if accepted it will not only widely disrupt many types of daily buying and selling of goods, but will also seriously impair the extension of credit to the smaller business enterprises which the Act was designed to protect.

*1. THE ROBINSON-PATMAN ACT DOES NOT MAKE ANY SINGLE SALES TRANSACTION VOID.*

In determining its meaning, the text and legislative history of a Congressional enactment warrant examination. One cannot, as Bruce insists, blur fifty years of legislative development by broadly asserting that, "The Sherman, the Clayton, and the Robinson-Patman Acts are alike in kind, in intent, in the actions they outlaw" (Pet. Brief, p. 23). Elaborate argument is unnecessary to demonstrate the fallacy of this contention. The Robinson-Patman Act was not simply a spelling out in detail of what was forbidden alike at common law and under the Sherman Act.

On its face, Bruce's argument seems to fall apart. We might even grant, *arguendo*, that the Sherman Act merely recited the common law rules against restraint of trade—a proposition which six decades of implementation by this Court make at least somewhat doubtful. But it is indisputable that the Clayton Act of 1914 was aimed at abuses that had not been originally embraced in the Sherman Act.[5] Congress had become

[5] In reporting the bill, the Senate Judiciary Committee in 1914 stated that it first made unlawful specific practices which "singly and in themselves, are not covered by the act of July 2, 1890, or other existing antitrust acts . . . ." *S. Rep.* 698, 63rd Cong., 2d Sess., p. 1. Compare *United States* v. *United Shoe Mach. Co.*, 247 U. S. 32 (1918) and *United Shoe Mach. Co.* v. *United States*, 258

aware of these abuses largely as the result of judicial decisions. And it was a specific portion, Section 2, of the Clayton Act that the Robinson-Patman Act of 1936 was enacted to expand.[6]

The Robinson-Patman Act deals with the *relationship* between two or more sales. If there is but one sale, the statute has no application. This is the cardinal difference between it and the Sherman Act which makes unlawful any *single* contract in restraint of trade. An understanding of this difference dissolves efforts to urge that the Patman Act makes any one sales transaction void.

If *S* sells a hundred units of a commodity to Jones on Monday for $100, that transaction is untouched by

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U. S. 451, 460 (1922), with respect to Section 3. See, also, *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 355-56 (1922); *International Business Machines Corp.* v. *United States*, 298 U. S. 131, 137 (1936). The process of specification continued after 1914, *e.g.*, in the Wheeler-Lea Act of Mar. 21, 1938, c. 49, 52 Stat. 111, which added "unfair or deceptive acts or practices" to Section 5 of the Federal Trade Commission Act. It is still progressing. See, *e.g.*, proposals to amend Sections 7 and 11 of the Clayton Act. Hearings on H. R. 2357, 79th Cong., 1st Sess., May 23, 1945; H. Rep. 1480, 79th Cong., 2d Sess., Jan. 21, 1946; H. Rep. 1820, 79th Cong., 2d Sess., Mar. 26, 1946. Cf. *Fed. Trade Comm'n.* v. *Western Meat Co.*, 272 U. S. 554 (1926); *Arrow-Hart & Hegeman Electric Co.* v. *Fed. Trade Comm'n.*, 291 U. S. 587 (1934). See also, Henderson, "The Federal Trade Commission" (1924) c. 1, p. 24.

[6] Bruce's attempt to assimilate the Robinson-Patman Act into the Sherman Act is perhaps best answered by its own brief. For after pointing out that in the Act Congress had foregone a "concrete definition of wrongs" in favor of a mere recital of "the common law rules against restraint" (Brief, p. 22), Bruce points out that in the Robinson-Patman Act price discriminations and their effects were "singled out for *legislative specification*" (*id.*, p. 24).

the Robinson-Patman Act. If *S* sells the same number to Brown on Wednesday, at the same price, neither the sale to Jones nor to Brown is in any way covered by the Act. On Thursday, *S* may sue either without concern.

If on Friday, however, *S* sells two hundred units of the same product to Smith for $90, there may be a violation of the Act if the price difference is "discriminatory" and if it has the specific unlawful effects prescribed in the Act. But only after the Friday sale can the two earlier sales have any relevance. Only their relationship is pertinent. No one of the three sales is in and of itself illegal.

The sale on Friday to Smith does not relate back and make the Monday sale to Jones *void*. Nor does it void the Wednesday sale to Brown. Both were proper on Thursday and *S* could sue for his price on that day. Thus no single transaction can be isolated by itself or called void. This was nowhere better stated than by Bruce's counsel in the pretrial proceedings in this case:

> "*Mr. Fowler:* I respectfully point out that it takes three persons and at least two transactions to violate the Robinson-Patman Act; and discrimination requires two sales . . ." (R. 175.)[7]

This illustration may be followed into Bruce's ultimate position in this case—that the existence of a quan-

[7] Thus where the seller refuses to sell one customer and sells his competitor, it has been held that no basis for violation can exist. A single sale cannot be illegal. "The discrimination in price . . . must be practised 'between different purchasers.' Therefore at least two purchases must have taken place." *Shaw's Inc.* v. *Wilson-Jones Co.*, 105 F. (2d) 331, 333 (C. C. A. 3d, 1939). See, also, *Sorrentino* v. *Glen-Gery Shale Brick Corp.*, 46 F. Supp. 709 (E. D. Pa., 1942).

tity discount, alleged to be unlawful, rendered all sales void.[7] *S* may well have had an illegal quantity discount in force when he sold to Jones on Monday and to Brown on Wednesday at the same dollar price. But unless and until he made a further sale on Thursday at a *lower price*, the Robinson-Patman Act could have no application. It is immaterial whether the lower price results from use of a discount schedule or is simply a price reduction.[8] Unless two transactions involving the same commodity sold under like circumstances with specific effects can be shown, the Act has no application. The individual sale cannot of itself be illegal. And the existence of a discount schedule or price list does not change this fundamental character of the Act.

Nor does it make any difference that Jones and Brown, instead of paying cash, gave their notes.[9] In short, what is prohibited by the Robinson-Patman Act is a specified unlawful effect arising out of the *relationship* between or among two or more sales. Violation is not in the sales transactions or in the effect of any one of them alone. It can be found only by comparing two or more transactions.[10]

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[8] Indeed, the existence of a price list or discount schedule is not of itself relevant because under the Act the *actual prices* charged, in two or more transactions are controlling no matter how arrived at.

[9] In the present case the sales to Bruce were by the contract terms originally to have been for cash. See Def. Exhibit 11. This was modified in part by the extension of a line of credit to Bruce. See R. 502-503.

[10] Consider the effect of Bruce's contention—that a later sale makes void an earlier one to a different buyer—upon the ordinary everyday sale of an article on the installment plan with security title retained by the seller until full payment: If at a later date the seller sells to another at a lower price, in violation of the Robin-

It is submitted that where the sales by *S* to Jones on Monday and to Brown on Wednesday are untouched by the Robinson-Patman Act, that a new rule which voids *ab initio* these sales because of a sale to Smith on Friday or to any person in the future can only cause confusion and uncertainty as to what is legal and what is a completed business transaction.

Further light is thrown on the fallacy of Bruce's contention that the sales to it are illegal and void if American violated the Patman Act in selling to others, by briefly examining what the statute requires for a violation when the relationship between the two groups of sales is scrutinized.

First, a mere difference in price is not enough. The difference must be a "discrimination." This means that the relationship among the various purchasers must be such that a lower price to one will concern the other.[11] Discrimination under the Act means more than a difference in price between purchasers; it means a difference in price where the attendant circumstances demand equal treatment. Legis. Note, 50 Harv. L. Rev. 106 (1936). For example, it has been officially

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son-Patman Act, and the first transaction is thus rendered illegal and void, and not entitled to judicial aid, is the seller not only to be denied the right to recover his price but also foreclosed from repossessing the article? On Bruce's theory of a *void* transaction, this must follow. See cases cited, main brief, p. 14. Wholly apart from the effect of the suggested interpretation upon installment selling, the Patman Act was never intended to work a forfeiture of this magnitude, or to upset widely established business methods.

[11] "In its meaning as simple English a discrimination is more than a mere difference. Underlying the meaning of the word is the idea that some relationship exists between the parties to the discrimination which entitles them to equal treatment . . ." Congressman Utterback, 80 Cong. Rec. p. 9559, June 15, 1936.

ruled that a seller may sell to the United States Government at a lower price than to others without running any risk of having made a "discrimination in price" under the Act. *Attorney General Opinion*, Dec. 28, 1936, 38 Ops. A. G. 539. Ordinarily, the two or more sales must be to purchasers who compete in the resale or use of the goods. Thus if the present defense is permitted in a suit for the purchase price, the issues immediately broaden into an inquiry into what each of the other purchasers besides Bruce made and sell. Does, for example, pineapple juice compete sufficiently with grapefruit juice to cause a violation? Does tomato juice compete sufficiently with other juices?

In this same connection, no discrimination exists despite differences in price if two sales are made at different times. This is true even though the seller maintains uniform discount schedules. A future sale does not have to be compared with a spot sale at a later date. See H. Hearings on H. R. 8442, 74th Cong., 1st Sess., p. 24. The goods must also be the same since only sales "of like grade and quality" need be compared; and the Act likewise exempts price differences where market conditions have changed, or seasonal factors intervened, or obsolescence has occurred, etc. Illegality in relationship cannot be found without inquiry into all of these matters insofar as they affect the various transactions. No single sale is void.

But paramount in controlling what is proper or made illegal in the relationship among sales, is the statutory specification of the *effects* which likewise must be found. These are fully set forth in our main brief, pp. 18-19. Not only is no single sale illegal; but even two sales at different prices which are discriminatory as between the purchases are not prohibited unless it can be shown

that they have a probable *substantial* effect upon competition.[12]

Sales at different prices under a uniform policy of customer classification have not in themselves been regarded as violative of the Robinson-Patman Act. Different prices may be justified on volume and accompanying differences in cost. The Federal Trade Commission, the agency primarily charged with the enforcement of the Robinson-Patman Act, has recognized group classification of customers for discount purposes. It has also recognized that the price differences do not need to be in precise mathematical relationship with the differences in cost in individual cases.[13]

This survey of the Act does more than point up the inadequacies of Bruce's pleas. It makes clear that the Robinson-Patman Act cannot be interpreted as rendering the sales to Bruce void. The statute attaches not to the sale or sales to it but to the relationship between them and sales to others. By themselves individual sales are neither inherently illegal nor directly touched

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[12] It is only at this point that it might be argued that a particular sale is touched by the Act. Subsection 2(f) [15 USC 13(f)] makes it unlawful "knowingly" to receive a "discrimination in price" in violation of the Act. Section 3 [15 USC 13a] makes criminally unlawful being a party to a transaction "which discriminates *to his knowledge* against competitors of the purchaser." Thus the buyer who gets the lower price in two or more transactions, and knows that the result will violate the Act, may be engaging in a wholly illegal transaction and relief will be denied him if the seller defaults. But under no conceivable interpretation of the statute can the sale to the innocent purchaser, who was charged the higher price and thus discriminated against, be deemed void. American could not have refused to deliver cans to Bruce.

[13] A fuller discussion of this point will be found in respondent's main brief. (pp. 42-45)

by the Act. And only where the comparison shows a "discrimination in price" which has the specified effects can a violation be found.

More than this, the text of the Act makes obvious what it might mean to permit a buyer, who has purchased and resold or consumed the goods, to raise such defense in a suit for the price. The single issue of money owed would turn into a proceeding of infinite complexity. It would necessitate inquiry, not into the relations between the seller-plaintiff and buyer-defendant, but into those between the seller and his other customers; into what these other customers did in their businesses and if or how they competed with the first buyer; into the time of the several sales, market conditions, and similarity or dissimilarity of goods; into the effect or lack of effect on competition.[14] And if, as Bruce asserts, the kind of pleas he has put in throws the burden on the seller to disprove violation, then the cost of legal collection from one to whom credit has been extended may far exceed the value of a debt.[15] To this point we shall return after demonstrating that under the repeated decisions of this Court the defense does not lie as a matter of law.

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[14] As Bruce states in its Reply Brief (p. 16): "Therefore if discrimination by a seller against a single customer is to be shown, there must of necessity be examination into the terms of sale to other customers. For that reason the law itself compels the inquiry to go beyond the transactions between seller and complaining customer."

[15] In one Federal Trade Commission case, the cost of preparation of accounting schedules to show lack of violation was stated to be in excess of $50,000. See *infra*, fn. 22.

*2. UNDER DECISIONS OF THIS COURT THE DEFENSE IS NOT AVAILABLE AS A MATTER OF LAW*

It has already been seen that under the Robinson-Patman Act, no individual sale and purchase of a commodity is rendered illegal. Only the relationship among sales—which gives rise to a "discrimination in price" having specified effects upon competition—constitutes a violation of law. This is wholly unlike the Sherman Act violation where the contract itself contains provisions in restraint of trade such as price fixing, production limitations, etc.

Writing for a unanimous Court in 1934, Mr. Justice Brandeis pointed out that

> "By *the long line of cases following Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, *it is settled* that *illegality constitutes no defense* when merely collateral to the cause of action sued on. A 'person does not become an outlaw and lose all rights by doing an illegal act.' " (*Loughran* v. *Loughran*, 292 U. S. 228.)[16]

This is not, as Bruce suggests, a mere matter of semantics or a play upon the word "collateral." The Court has consistently drawn the line between (1) a contract which is void because the illegality is found within the four corners of the contract itself and in what the defendant is obligated to do by that contract, and (2) a contract which is proper in itself but where the defendant charges that what the plaintiff is doing with others is unlawful. The typical case in the first group is that of a *patent license agreement* containing *price fixing clauses.* The licensee agrees to follow the

[16] The line of cases, holding that the vendee, when sued for the purchase price of goods cannot plead illegality not inherent in the specific sales contract, is reviewed in our main brief at pp. 22-24.

licensor's direction on resale prices. Or he agrees to restrict his production. These provisions of the contract itself are illegal on their face unless the patent is valid. Hence the licensee when sued, may plead that the patent is invalid and the contract is therefore void. *Cf. Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173 (1942)[17]. The second group is typified by the case at bar where the purchaser is sued for the price of goods. His contract is not illegal, but he alleges illegality arising out of what the seller does with other purchasers.

Bruce repeatedly seeks to avoid this settled rule by confusing the issue. It argues that American's stand-

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[17] In the *Sola* case, Chief Justice Stone made it clear that only inherent illegality in a sales contract itself could be a bar to recovery. Referring to a case where violation of the Sherman Act had been permitted as a plea to bar a suit for the purchase price, *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U. S. 227 (1909), he carefully pointed out that there the goods had been "purchased from an illegal combination *in pursuance of an illegal agreement, both in violation of the Sherman Act.*" (317 U. S. 177.)

It is also clear that the case at bar is unrelated to either the *McGregor* or *Katzinger* cases now pending. *McGregor* v. *Westinghouse Electric & Mfg. Co.*, No. 28, Oct. Term, 1946; *Edward Katzinger Co.* v. *Chicago Metallic Co.*, Nos. 70-71, Oct. Term, 1946. In these two cases, the license agreement contains price-fixing provisions. The licensor seeks to recover royalties or damages for infringement, but not to enforce the restrictive covenant. The issue is whether the price-fixing covenant *in the contract itself* renders the entire agreement illegal or is separable so as to permit enforcement of the royalty provision. The whole inquiry is within the four corners of the contract. The case at bar does not involve an illegal sales transaction in whole or in part. If any violation of law exists, it flows not from the sales to Bruce but from their possible relation to different sales to others under various marketing conditions which control legality.

ard sales contract contained a discount schedule which Bruce alleges is illegal. Accordingly, Bruce contends that the contract is in itself therefore illegal, and that the present case is analogous to the Sherman Act cases. This is demonstrably fallacious. If American made a particular size and style of can for Bruce alone—as it does for many customers—and never sold this can to others, there would never be two comparable transactions upon which to charge discrimination under the Patman Act. It would be immaterial what discount schedule was contained in the sales contract.[18] Or if the top discount brackets in the uniform contract were never utilized in selling cans to others, comparable to those sold to Bruce, the listing of those discounts in the standard sales contract is irrelevant under the Act.

The basic distinction between illegality arising out of two or more transactions between at least three different people, and illegality inherent in the contract between two people alone, may be seen in even a simpler manner. To prove a violation of the Sherman Act you need show only an agreement between A and

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[18] That Bruce is not unaware of the fundamental fallacy in its argument is shown by its Reply Brief, p. 15. Here it is driven to argue that there are no differences whatever in all types and sizes of containers, "regardless of what purpose for which used." In this effort to escape the decisions of this Court, Bruce writes out of the Patman Act the requirement that there must be "different purchasers of *commodities of like grade and quality*." This cannot apply to things which are wholly different to begin with: An oval can for sardines, a friction top can for salted peanuts, a can for lubricating oil or for tennis balls, and a can for aspirin—these are not the same in type or size or use or even the kind of metal from which made. They are not "commodities of like grade and quality" even though the same discount may be applied to the sale of each of them.

B containing a provision in unlawful restraint of trade. But to show violation of the Patman Act, you must show not only what was done in the transaction between A and B, but also in the other transaction between A and C, and what the joint effect of the two sales may have been. Alone neither can be illegal, and void, under the Robinson-Patman Act. And this is true even though a standard contract was used in both transactions.

No amount of dialectic should obscure this fundamental rule of law that unless the sales contract itself is void, the seller may recover his purchase price. *Wilder Mfg. Co.* v. *Corn Products Ref. Co.*, 236 U. S. 165 (1915); *Small Co.* v. *Lamborn & Co.*, 267 U. S. 248 (1925). It is not only the settled view of this Court under the Sherman Act. In the only two instances in which a purchaser has attempted to avoid payment of the price of goods by alleging a violation of the Robinson-Patman Act in sales to others, the courts have refused to allow the defense. The *Progress Corporation* case in the New York Supreme Court is set out in our main brief, p. 24. In the other case, in the Southern District Federal Court in New York, decided by Judge Leibell on June 7, 1944, the seller sued to recover the purchase price of flour. The buyer, as has Bruce in this case, brought a treble damage action against the seller alleging violation of the Robinson-Patman Act arising out of rebates to other purchasers. The buyer also attempted to plead these violations as a defense in the suit for the purchase price, and then moved to consolidate the cases on the ground that a common question was involved in both cases.

Judge Leibell pointed out that the charge that the Patman Act was violated in selling to others at lower prices did not void the sales to the defendant.

"The contracts on which International [the plaintiff seller] sues are not invalid under the antitrust laws. All that has been alleged is that they are collateral to a practice prohibited by the statutes. . . . There is, therefore, no common question of law or fact in the two actions. The motion to consolidate is accordingly denied." *Gross Bros. Flour Co.* v. *International Milling Co.*, S. D. N. Y., June 7, 1944, C. C. H. Trade Reg. Serv., Par. 57,262.

Thus not only have the decisions of this Court made it clear that only illegality contained in the contract itself will bar recovery, but in the only two cases found in which the attempt was made based on asserted violations of the Robinson-Patman Act, it was readily recognized that violation of that Act does not render any single sale void and cannot bar suit for the price of the goods.

Bruce seeks to avoid this settled law resting on sixty years of decision by urging that the rule should be changed where a buyer pleads a violation of the Robinson-Patman Act. It offers no support from the specific provisions of that Act. But after asserting that the sales to Bruce were *void*—a proposition which cannot stand—it urges that the Court must allow the defense in a suit to recover the price of goods in order to permit efficient enforcement of the Robinson-Patman Act.

This seems to us an unwarranted request for judicial legislation. We believe that the enforcement activities of the Federal Trade Commission and the Department of Justice are not ineffectual. We also believe that the treble damage action has proved to be in proper cases

an appropriate remedy.[19] Congress is the proper forum to change the law or to enact new laws for additional remedies. As above indicated, the contrary course suggested by Petitioner's interpretation of the Robinson-Patman Act turns a simple action for debt into a prolonged anti-trust action, and creates an additional remedy not contemplated by Congress. Further, this suggested remedy of not paying for goods bought and used is particularly objectionable, for it would inflict a penalty entirely unrelated to the damage done, if any.

This points up one of the key fallacies in Bruce's position. If, instead of seeking treble damages for alleged violations of the Robinson-Patman Act, a buyer can assert that the sales transaction is void and the price unrecoverable, the effect may be to make the penalty wholly unrelated to the violation. *S* may sell *B* a hundred thousand units at a dollar apiece, and sell *C*

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[19] For examples of successful treble damage actions under the Robinson Patman Act, see *Fitch* v. *Kentucky-Tennessee Light & Power Co.*, 136 F. (2d) 12 (C. C. A. 6th, 1943); *Elizabeth Arden Sales Corp.* v. *Gus Blass Co.*, 150 F. (2d) 988 (C. C. A. 8th, 1945), cert. den. 66 Sup. Ct. 231. And decisions of this Court have hardly made proof of damage a hazard. See *Bigelow* v. *RKO Radio Pictures, Inc.*, 66 Sup. Ct. 574 (1946); *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359 (1927); *Story Parchment Co.* v. *Patterson*, 282 U. S. 555 (1931).

And Bruce itself, in seeking this remedy filed a treble damage action in the Florida Federal District Court against American, predicated on these same transactions, shortly after American brought suit on the notes. *Bruce's Juices, Inc.* v. *American Can Co.*, No. 569, Civ. T., S. D. Fla., filed Oct. 2, 1942. This action was started before the amended pleas were filed on Nov. 6, 1942, in the first State court suit on the notes (R. 4), and long before the second note suit was filed on Jan. 22, 1943 (R. 39).

ten thousand units at 98 cents.[20] Assuming that this difference is a "discrimination" and that it is found to have a substantial effect upon competition between *B* and *C*, there is a violation of the Act. If *B* has suffered $10,000 damage, he may collect $30,000 and counsel fees as Congress has provided. But if the violation renders the sales to *B* void and the purchase price cannot be recovered, the penalty to *S* is $100,000. And since the lower price sales to *C* must also be void, *S* cannot recover from *C* either if he has been sold on credit. Thus against the $10,000 injury to *B*, a penalty of $109,800 results on Bruce's theory that the transactions are void. This would be in addition to the recovery in the treble damage suit.

As applied in the present case, the position taken by Bruce is even more extreme. Admittedly, neither the pleas nor the proof (*Vide infra*, pp. 33-36) offered in the pretrial proceeding tied the indebtedness represented by the notes to any particular sales transaction with Bruce, or related this indebtedness to any specific sale of like cans at any time to any competing packer. Eventually, it was clear that all that was pleaded, or offered to be proved, was that American had a quantity discount system in the six year period. This Bruce insists is sufficient to make out a *prima facie* case of illegality, and to make *every sale to Bruce and every other purchaser* during the six-year period legally *void*. To quote Bruce's argument, the quantity discount schedule "directly and inherently affected *every* transaction by petitioner [Bruce] out of which emerged the notes on which suit has been

[20] On Bruce's theory it is immaterial what quantity is sold to the other purchaser. And as noted, Bruce nowhere in its pleas alleged any specific injury or specific damage. See Respondent's Brief, pp. 6-7.

brought."[21] *Reply Brief*, p. 3. This is Bruce's ultimate position. And since every sale of such type and size of can sold to every other food packer during these six years was made subject to the same uniform schedule, Bruce's argument covers all.

The astonishing result of giving approval to this type of defense is thus clear: If the quantity discount schedule based on volume purchased could not be completely justified—whenever a buyer refused to pay for goods and interposed the requested defense—every sale would be *void*. Every other buyer could likewise refuse to pay. And the loss to the seller would be wholly unrelated to the size or any possible effect of the asserted discrimination. It would be the *full amount* of the purchase price in every sales transaction. For on the theory of the defense here asked to be recognized, every individual sale is *void*, and there can be no recovery.

We submit that nowhere is it remotely suggested in the Congressional consideration of the Act that such a forfeiture was contemplated when the expanded concepts of unlawful price discrimination were enacted in 1936. Even more compelling is the practical commercial effect which any such rule would have. To this we now turn.

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[21] As will be seen, Bruce goes further and even though it cannot relate the notes to particular sales or show any injury to it, Bruce urges that "no facts could be introduced" to justify a customer classification based on total volume purchased. See *infra* pp. 38, 39. The result urged is that a seller using a quantity discount system cannot collect for anything it has sold on credit. Irrespective of the measure of the alleged discrimination and apart from any competitive effect, the total purchase price on all sales is beyond recovery because every sales transaction is legally *void*.

*3. TO ALLOW THE ASSERTED DEFENSE WOULD DISRUPT EVERY-DAY BUYING AND SELLING, AND IMPAIR READY EXTENSION OF CREDIT, PARTICULARLY TO SMALLER BUSINESS ENTERPRISES*

It is paradoxical that allowance of the defense which Bruce asks for in the name of the small business man would have a drastic adverse effect upon smaller enterprises. This follows, without challenge, from the scope of the Robinson-Patman Act, from the extent to which the giving of short or long term mercantile credit to buyers is practiced both in selling raw materials and goods for resale, and from the obvious effects which would flow from permitting this defense in every suit to recover the purchase price. Even if the law were unsettled, these demonstrably undesirable results would seem to show that this could not have been intended by Congress and to require this Court to deny the asserted plea.

The Robinson-Patman Act is applicable throughout the whole of American industry. The prohibitions against price discrimination reach the sales by small as well as by large sellers; they apply to the sale of raw materials for manufacture, to the sale of the finished goods for resale both at wholesale and retail; they require scrutiny of spot sales and of future sales; they apply to sales for cash or on credit or on installment payments, to payment by trade acceptance, by bill of exchange, and by note. The prohibited effects are not measured merely by their substantial tendency to monopoly, but reach the narrower "lessening of competition" and the mere injury or prevention of competition among sellers, buyers, or the "customers of either of them." In short, any set of sales transactions by any interstate seller to any kind of buyer are here concerned.

If any time that a seller sues a buyer to recover the price of goods, which the buyer has accepted and con-

sumed or resold, the buyer with no other defense can plead a violation of the Robinson-Patman Act, it needs no legally expert person to appreciate the complexity and cost thus added to the legal collection of a business debt. A suit for the price of goods sold, or for the collection of notes given in payment in the extension of mercantile credit, is a simple garden variety of legal action. An antitrust proceeding is a wholly different thing. As we have seen, the scope of the issues raised reaches far beyond and behind the particular sale. They make it necessary to inquire into, to take depositions on, and to litigate the relation of the seller to many other customers. Prices, discounts, invoices on a multitude of sales are evidentiary; assembly of such material into practicable exhibits is essential; comparisons of goods, markets, methods, time of sale, costs of manufacture and delivery may have to be made. And if, as we have seen, from the pleas filed by Bruce, the alleging of price differences and violation merely in the words of the Act, is to be taken as *prima facie* sufficient, and as Bruce contends the burden is then on the seller to disprove violation, this costly burden can be cast on the seller in any suit for the purchase price.[22]

[22] These complexities and costs are well illustrated in the present case. Bruce asserts that the cost accounting studies made available to it were not sufficiently detailed and requested American to produce detailed invoices and books of account covering a large group of customers. Yet the record discloses that $5,000 was expended in getting together the material requested and furnished for one session during the pretrial proceedings in New York City (R. 102). It has been informally stated that the preparation of cost accounting studies necessitated the expenditure of several hundred thousand dollars in a recent Federal Trade Commission proceeding under the Robinson-Patman Act, where the cost justifications were ultimately deemed proper under the Act.

In most cases this means that the cost of collection will exceed the amount of the debt. More than this, allowing the requested defense will mean the likely freezing of all outstanding accounts. For if one buyer can allege and prove unlawful discrimination in sales to others, on the theory that it makes the individual sales transactions with him *void*, all others who have purchased would be well advised to withhold payment. For if the separate sales are legally void, these other purchasers cannot be made to pay. Even a seller confident that his operations can ultimately be proved proper, and most certainly all those whose operations might be challenged, are not going to risk these costs and complications when the obvious way out is *not to extend credit.*

That long and short term credit to buyers by sellers is the lifeblood of commerce needs little discussion. If most sales of goods for resale or consumption were made C. O. D. (or sight draft against documents), the commercial impact would be critical. See Beckman, "*Credits And Collections In Theory And Practice*" (1938), pp. 6-7; Irons, "*Commercial Credit And Collection Practice*" (1942), pp. 94 *et seq.* But to the smaller enterprise—the under-capitalized, the developing business, the temporarily overextended—mercantile credit is well nigh vital.[23] Such credit is often the only hope for small and new enterprises to prosper.

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[23] Insofar as retailing is concerned, "mercantile credit makes the neighborhood store possible by enabling its owner to overcome financial limitations. Without this intimate financial aid, men with limited capital would be handicapped in entering business, and many struggling merchants of ability would be unable to continue if credit arrangements were to cease and cash were demanded for all purchases." Beckman, "*Credit And Collections In Theory And Practice*" (1938) pp. 59-60.

> "Commercial credit affects the output of goods by opening business opportunities to men who could not otherwise take advantage of them because of lack of funds." Slichter, "*Modern Economic Society*" (1931), p. 243.

And the direct relation between extension of credit and the availability of ready legal means of collection cannot be questioned.

> "The dependence of the credit system upon the existing legal system has often been pointed out. After all, as Commons indicates, in a credit economy there occurs 'transfer of goods and services for a mere promise to pay a price, whose reality is none other than confidence in expected behavior of citizens, judges and legislatures.' First is established the enforceability of contracts, without which no credit man would give second thought to an applicant for credit." Prendergast & Steiner, "*Credit And Its Uses*" (1931), p. 10.

As already stated, if a suit to collect the price of goods sold can be turned by a general plea of violation of the Patman Act into a comprehensive, complicated, and costly antitrust action—or throw the burden of disproving violation on the seller—the extension of mercantile credit normal to business transactions will be wholly changed. It must no longer turn on the character, resources, or prospects of the buyer. But it must instead be measured, if at all, against the cost of meeting the kind of defense here sought to be recognized.

We respectfully submit that no more drastic or far reaching change in the structure of business operations could be caused by such a reversal of the settled decisions of this Court. And no more direct method of cur-

tailing the extension of credit could be suggested.[1] For not only do these need credit more than the larger, established businesses, but by the same token they would be considered the buyers who might because of inability to pay make the kind of defense here requested. Thus the impact of allowing the defense would be on the very group whose welfare Bruce professes to advance in seeking to avoid payment for what it has purchased.

To summarize: Long standing decisions of this Court establish that only where illegality under the Sherman Act can be found in the contract or transaction sued upon, will a plaintiff be denied all relief on the ground that violation makes the contract void. The unlawful price discrimination prohibitions, added to the Clayton Act in 1936 by the Robinson-Patman Act, apply only to the relationship between two or more sales to two or more buyers. The Act does not make illegal any single sales transaction standing by itself. It measures violation against the finding of discrimination having specified effects. On its text, the Act cannot make any sale to a buyer at a higher discriminatory price legally void. Thus passing the generality of Bruce's pleas in this case, even a complete showing of an unlawful price discrimination under the Robinson-Patman Act cannot be

[1] If Bruce is taken at its word to be a small enterprise, no better example could be offered where the development of a business is dependent on mercantile credit. For the development of Bruce's business was measurably made possible by the extension of credit to it. This is illustrated by Bruce's letter of October 30, 1941 (R. 339-40) in which he makes it clear that in preparing his financial statement he desires to show his outstanding indebtedness to American as a long term rather than a current liability.

a bar to a suit to recover the price of goods sold to one buyer at a higher price. So to hold would do more than provide a remedy not given by Congress in the Patman Act. It would impose a penalty wholly unrelated to any damage to any buyer. More important, thus to change the ordinary law suit for the price of goods into an inverted, complicated, and costly antitrust proceeding, would seriously curtail the giving of commercial credit by seller to buyer. This departure from settled law would have its impact primarily upon the smaller enterprises which the Act was intended to protect. These reasons alone require a denial of the defense here argued.

**II. THE CONTENTIONS PRESENTED IN THE BRIEF FILED AMICUS CURIAE BY THE UNITED STATES ARE WITHOUT VALIDITY.**

The *amicus* brief filed by the Department of Justice, after asserting that the Robinson-Patman Act is an integral part of the antitrust laws, broadly asserts that all defenses of illegality recognized as proper under the other antitrust laws carry over and are equally appropriate under the Robinson-Patman Act. It is true that where, as in the Sherman Act, offenses known to the common law are codified by statute and new remedies, either public or private, are provided by that statute, the existing remedies at common law are not thereby destroyed. But it is only in a technical sense that the Robinson-Patman Act may be said to be a part of the antitrust laws. The offenses which it defines and proscribes are new offenses created by it, and in defining these offenses it prescribes the specific remedy available to an injured private party, viz. a treble damage suit. As shown in our main brief, Congress, in considering this statute, was unwilling even to permit the recovery of price differences by an injured party. (Main

Brief, pp. 12-13) It would seem that the doctrine of the *Wilder* case, *supra*, is here directly in point.*

In support of its contention that Bruce's contract of sale is an illegal sales agreement, the *amicus* brief states that "Essentially what is prohibited by each section [of the statute] is sale of goods to different purchasers at different prices." This is erroneous and misleading. As repeatedly pointed out above, it is only sales at different prices under certain specified circumstances, and which produce certain undesirable results, which are prohibited. The ingenious argument is advanced that the high price and the low price are equally illegal, because they are part of the "offense" prohibited by the statute. The use of this word "offense" leads into casuistry. It is apparently used to convey the impression that it is synonymous with criminal conspiracy or criminal violation, every step in which might be considered illegal. But a reading of the statute demonstrates that this is not the case. The abuse aimed at in paragraph 2(a), under which this case arises, is the creation of a competitive disadvantage resulting from charging different prices under substantially the same conditions. The paragraph prohibits discrimination but contains no criminal provision. Nowhere does the

* The gravamen of the violation in paragraph 2(a) is, as stated, the creation of a substantial competitive disadvantage. The cases cited by the Government (*Amicus* brief, page 13, footnote 10) arose under Setcion 2(c) relating to illegal brokerage, commissions, etc. The provisions of that section are substantially different from those in paragraph 2(a). The effect on competition is not an element of violation under Section 2(c). That section specifically makes punishable the granting or receiving of unlawful brokerage or commissions, etc. It seems misleading to cite these cases as opposed to the authorities cited by us, such as the *Progress Corporation* and the *Gross Brothers* cases.

statute intimate that the charging of the higher price is in and of itself an illegal act, and it is significant that under Section 3, which defines criminal violations, it is only sales at the *lower* price that are declared unlawful. This, we think, shows that the transactions of sale here involved cannot be treated as an "offense" every transaction related to which is illegal.

Even if Bruce had shown or could show on this record that the giving of a lower price to a favored competitor had produced either one of the two effects required by the statute, nevertheless Bruce's contract would not be illegal, and any illegality involved in the contract for the more favored competitor could not be pleaded as a bar to a suit on Bruce's contract. This is the answer to the Government's assertion that a sale at the higher price being, like a sale at the lower price, a part of an offense, any court giving judgment for the higher price is aiding in the commission of the offense. The question framed by the Government—"Is this a suit to enforce a contract which is illegal under the Robinson-Patman Act?"—must, therefore, be answered "No". This analysis also demonstrates the fallacy inherent in the Government's closing vague suggestion that possibly a recovery might be had on a *quantum meruit* basis. If the dealings with Bruce were of an illegal character as part of an "offense", under the Government's own argument there could be no recovery at all. But no such legal issue is tendered in the pleadings or presented by the record in this case.

Further, it seems also significant that the Government, although discussing some of the most important policy considerations, makes no reference to the record in this case and entirely ignores the effect on commercial credit of a reversal of the judgment below.

### III. THE COURT BELOW PROPERLY RULED THAT ON THE FACTS DEVELOPED IN THE PRETRIAL PROCEDURE THE SUMMARY ENTRY OF JUDGMENT PURSUANT TO STATE PRACTICE MUST BE AFFIRMED.

If this Court should now hold that a buyer sued for the price may defend by showing a violation of the Robinson-Patman Act in sales to others—on the theory that the sale to him was void and he need not pay for the goods—it is still necessary in the case at bar to determine whether the court below erred in concluding that "under the facts submitted" Bruce had not made out this defense.

It will be recalled that after testimony occupying over 500 pages of this printed record, and a large number of exhibits, had been received, and both sides closed the pre-trial proceeding, the trial judge ruled that as a matter of law, the defense was not available. (R. 582.) On appeal, the Supreme Court of Florida first concluded that this was wrong. (In so doing, it missed the key point that the Robinson-Patman Act, unlike the Sherman Act, does not make illegal any particular sale, but that illegality can be found only by comparing a series of sales and determining their effect as a group. (See R. 599.))

American then asked for a rehearing on two grounds. The first was that the Supreme Court of Florida was wrong on the law—"discrimination is not a contract at all, but is a general course of business affecting the relation between the seller and all its customers". (R. 604.) The second ground was this: Even if the defense were available, on the evidence taken in the pretrial proceeding, the Supreme Court of Florida could, pursuant to State practice, "consider the entire rec-

ord" and affirm the judgment.[25] In its petition American pointed to the evidence—the testimony of Bruce and his witnesses, the exhibits, etc.—and contended that no violation had been made out. Put another way, it argued that Bruce had not shown that it could support its vague, general pleas even if legally they could be interposed.

This the Supreme Court of Florida did. After holding the case under advisement from November 17, 1944 to April 17, 1945, the court concluded in a *per curiam* decision that

> "the defense attempted to be interposed was not available under the facts submitted in evidence to the court below and, therefore, the judgment should be affirmed." (R. 621)[26]

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[25] American urged that

> "The pleas, (wherein Appellant [Bruce] charged Appellee [American] with discriminating in price against it in favor of others, while averring simultaneously that such prices and terms of sale were unknown to it, Record 52); the defenses abandoned during the progress of the cause on appeal (Record 95; Appellee's Brief, pages 5, 42); and the quality and nature of the evidence it offered, demonstrate to a moral certainty the frivolous and baseless nature of the defenses here. . . ." (R. 616.)

[26] Bruce seeks to confuse this decision by arguing that only 3 out of 7 judges took this view. (Pet. Brief, p. 16). This was largely the basis for its petition for rehearing in this Court. (Petition for Rehearing, pp. 6-7). Even though its relevance is difficult to see, this is incorrect. The record shows clearly (R. 621) that Judge Sebring concurred in the *per curiam* on the facts, and also separately stated his further opinion that the defense was not available as a matter of law. Under Florida practice this is the regular manner of indicating both a general and special concurrence.

Bruce assails this judgment on two bases. The first is that the Florida State practice results in "serious departures from the ordinary requirements of proper process in a State court." This, we think is a catchall due process objection first thought of in this Court. Its complete lack of foundation is fully dealt with in our main brief, pp. 31-33, and need not be again considered.

Bruce's second ground is that the Florida Supreme Court was wrong in concluding that, on what Bruce demonstrated it would be able to prove, it could not make out its charges. In substance, it asks this Court to review the entire record and exhibits on this issue. It might be observed, however, that on another defense which collapsed Bruce does not claim denial of due process. It pleaded a "conditional delivery" of the notes. On this the trial court found that Bruce could not make proof (R. 581-82) and the defense was abandoned. (R. 600.)

Of course, apart from constitutional issues, ordinarily it is not the function of this Court to review such fact questions determined by State courts pursuant to State procedure. But since Bruce urges that it be done, we briefly examine what Bruce showed it could prove on its charges—what the court below found in this record and the accompanying exhibits.[27]

In the first place, there is in this case the fundamental defect that Bruce cannot tie up any of the notes to spe-

[27] On oral argument, counsel for Bruce stated that plaintiff's exhibits 2 to 14, inclusive, were never received in evidence. These exhibits were in proof of the legality of the quantity discounts. By inadvertence they are not printed in the record, but they were transmitted to this Court by the Supreme Court of Florida and are on file here. Filed with these exhibits in this Court is an order signed by the Circuit Court Judge stating that they had been received in evidence. They were treated as being in evidence by the Hillsborough County Court, the Florida Supreme Court, and both parties to this litigation until the oral argument in this Court.

cific purchases by it. The renewal notes are void, it claims, because the original sales were void. But which sales transactions affect which notes it cannot specify. (See Respondent's Brief, pp. 5-6, 34-35, 37 and record references.) Nor can it—as American pointed out to the court below (R. 614)—even relate the notes in point of time to particular sales. No proof was available or suggested on the essential question as to what part of the indebtedness arose before or after there occurred the sales to others which Bruce says gave rise to the discrimination. (This defect is examined in detail in our main brief, pp. 34-38.)

Turning to its charges of discrimination, several collapsed beyond challenge and some were abandoned by Bruce. On the charge of discrimination in making truck deliveries (*e.g.*, Third Plea, R. 5), Bruce admitted in his own testimony that there was no discrimination (R. 78), and his counsel waived this charge on argument below. (Bruce Reply Brief, Florida Supreme Court, p. 12.) As to alleged discrimination on closing machines (Second Plea, R. 5; Seventh Plea, R. 9; Second Plea [second case], R. 42-43), Bruce again had no proof (R. 72-73), and once again his counsel waived these charges on argument. (Reply Brief in Florida Supreme Court, p. 12.)[28] Thus, these two charges of discrimination can be eliminated.

Next there is the only remaining definite charge. This is that American sold cans cheaper in Texas than in Florida. As pointed out to the court below (R. 614),

[28] In view of this record, the attempted reintroduction of these same charges in this Court, without mention of abandonment below, is difficult to explain. See Petitioner's Brief, pp. 29-30, items (b) and (e). The abandoned charges are again repeated in the Reply Brief, p. 14.

and from the uncontradicted facts and admissions of record fully reviewed in our main brief, pp. 33-37, this issue likewise foundered for lack of proof. The two different sizes of cans concerned were not the same and one was considerably more expensive to produce. But controlling on this issue was Bruce's admission that its competitor in Texas paid more in fact to get his cans than did Bruce. (See Resp. Brief, p. 35 and record references.)

This left only Bruce's general charge that in selling all sizes and types of packers food cans to others throughout the United States American sold them at lower prices. Bruce's position is simply that once it showed a general difference in price, reflected in a quantity discount on all containers of every type and size for the packing of food, this was *prima facie* evidence of illegality in every transaction—and enough to make every transaction void. This comes down to saying that once a buyer, sued for the price, shows that the seller had a uniform discount schedule—and shows nothing else—he has made out a case of violation of the Act.

It is here that Bruce's failure to relate the notes in suit to any particular sales transactions at any specific times made the summary judgment the only possible action that the lower court could take. For only by tying the notes to particular sales of cans which were at the same time sold to other customers packing competing products can Bruce bring any transactions within the Act.[29] Bruce asserts simply that other food

[29] Just how thin Bruce's position remains, can be gathered from its Reply Brief. In urging that it need not relate sales to it to any other sales, or specify in some way what is required by the Act, Bruce argues that, "Cans are a miscellaneous category of various sorts and sizes contrived to serve the *same or different purposes*. There are cans for corn, peas, asparagus, string-beans, to-

packers got a discount and that it did not during the six-year period. The record makes it clear that none of the customers receiving discounts purchased the smaller special juice cans during the period in which the indebtedness arose. (See Main Brief, pp. 5, 36-38.) And it was with respect to these small cans that the testimony proffered in the pre-trial proceeding principally dealt. Apart from this, Bruce made it clear that it could not relate any of the indebtedness represented by the notes—which constituted only a fraction of the total amount of sales to it over the six years—to purchases in any year of any particular type and size of container. The most that could be said was that the indebtedness represented can purchases in a "blanket way" over the entire, or possibly some part, of the period. (R. 373-374.) Thus there was a complete failure to establish concurrent sales of like commodities to others at discriminatory prices.

Even apart from this failure to establish two different sales of the same commodity at the same time, Bruce also failed to offer any proof of competitive injury. It did not attempt to demonstrate that the pineapple juice packed in Hawaii or the vegetable juice packed in California or Indiana was in competition with its products, that such products were sold at lower prices, or that

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matoes, pineapples, peaches, *and a great array of products, sold in diverse markets.* (R. 213-14.) The one thing in common is that this discount, operating in disregard to type and size of product, applied to all sales of cans whether of grocery or smaller size, and *regardless of what purpose for which used.*" *Reply Brief*, p. 15. If this attempt to rewrite the Act is accepted, a sale of a can for lubricating oil or insecticide at a lower price than a sanitary can sold to Bruce is *prima facie* illegal regardless of the competitive effect which Congress specified. Even more, Bruce's position is that merely showing such price differences is enough *prima facie* to render all of the sales *void*.

Bruce had been affected in any way. Even assuming *arguendo* that there was some price discrimination in favor of buyers engaged in the packing and selling of grapefruit juice in Florida, Bruce must show some effect on its operations. At the least there must be proffer of proof that the competing discount-receiving packers sold their products at lower prices, that in some market at some time Bruce was competitively injured, and that such injury was substantial. No evidence on these requisite points was developed in the pretrial proceedings. Without such proof, no violation of the Act could be established.[30]

Confronted with this failure to establish a *prima facie* case on its defense—as found by the court below—Bruce here attempts to argue that it is enough for it to establish differences in price and that the burden was on American to disprove a violation of the Act. The technique is to make a general over-all assault on American's discount schedule. For to make a complete picture in the pre-trial proceeding, American introduced comprehensive accounting schedules justifying its schedule. It offered to "make the records of the company available to defendant's [Bruce's] auditors

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[30] Bruce attempts to make a point of the refusal to permit the production of detailed confidential information. The lack of substance in this claim, and the fact that all relevant evidence was introduced, have been shown in our main brief, p. 41. But it must be understood that none of these questions related in any way to what Bruce had to prove. American's detailed invoices were irrelevant to the failure of Bruce to offer any data whatever to establish *prima facie* that effect on competition requisite under the Act. This red herring arising out of an unsuccessful attempt by Bruce's counsel at a fishing expedition into American's detailed records, cannot obscure Bruce's failure to make out a violation.

for the purpose of examining the details" (R. 238) in these schedules. This Bruce's counsel never pursued.

The validity of the showing made—assuming that absent any *prima facie* showing by Bruce of a violation, American had to do anything further—has been fully demonstrated in our main brief, pp. 42-47. It suffices here to point out that Bruce's position reduces itself to the assertion that under the Robinson-Patman Act a seller may not for discount purposes group his customers but must in effect establish a separate discount basis for each separate customer.

Nowhere in this Court or below does Bruce deal with what the exhibits showed as to differences in the cost of sales. Its position is that any classification of customers by volume purchased—without reference to demonstrated savings—is illegal. Bruce insists that the statutory reference to "only due allowance" for differences in sales cost relates, in Bruce's words, only "to sales to *particular* customers and *not* to *classes of customers.*" *Reply Brief*, p. 18.[31] Since Bruce insisted the classification was illegal, its final position is that, "Therefore, *no facts* could be introduced by respondent to justify such a system." *Reply Brief*, p. 17. Presumably, having shown a mere price difference, but no relation to specific sales to others of any particular cans sold to it, and no competitive effect, Bruce on this basis sought to prove that the sales to it were legally *void* and it need not pay for what it has bought.

This is not the law; the grouping of customers for discount purposes has been repeatedly approved by the

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[31] Hence Bruce's reluctance to deal with the exhibits—which it did not challenge, and did not avail itself of the opportunity to check—and its insistence on its right to examine individual costs of sale by American to individual customers.

Federal Trade Commission; and, as we have further shown, even if it were, the only justification item to which Bruce objected did not affect the result as to it. (See discussion and analysis of cost exhibits in Respondent's Brief, pp. 45-46.)

Consequently, if this Court should hold the defense available, and if it desires to review in detail the lengthy record and accompanying exhibits, we submit that on the facts developed in the pretrial proceedings the lower court, pursuant to the established Florida State practice, was clearly right in concluding that the defense could not be established in this case. On any theory the notes sued on were void only if the original sales were void, and Bruce could not tie up any note with any sale to it at any particular time in the six-year period. Two of Bruce's charges of discrimination —relating to truck deliveries and closing machines— collapsed for want of any proof and were withdrawn below (even though now sought to be here revived). The detailed and unchallenged data on small cans disposed of any basis for a claim of discrimination. This left only a generalized assault on an over-all quantity discount as to which no showing was made of any available proof of competitive effect. And in addition the unchallenged facts in American's accounting data showed full cost justification.

## CONCLUSION

We submit, therefore, that the judgment of the lower court must be affirmed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945.

No. [redacted] 27

BRUCE'S JUICES, INC., a Corporation, *Petitioner*,

v.

AMERICAN CAN COMPANY, a Corporation.

MOTION FOR LEAVE TO FILE AND

## MEMORANDUM IN SUPPORT OF PETITION FOR CERTIORARI AS AMICUS CURIAE.

WRIGHT PATMAN.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945.

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No. ——.

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BRUCE'S JUICES, INC., a Corporation, *Petitioner*,

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AMERICAN CAN COMPANY, a Corporation.

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## MOTION FOR LEAVE TO FILE AS AMICUS CURIAE MEMORANDUM IN SUPPORT OF PETITION FOR CERTIORARI.

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Comes now Wright Patman, and moves the Court for leave to file as amicus curiae a memorandum in support of the petition for certiorari in the cause of *Bruce's Juices, Inc.*, v. *American Can Company*. Attached to this motion is the memorandum in question.

The appellee has been notified of this motion by mailing to it a full copy of this motion and of the memorandum.

Respectfully submitted,

WRIGHT PATMAN.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945.

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No. ———.

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BRUCE'S JUICES, INC., a Corporation, *Petitioner*,

v.

AMERICAN CAN COMPANY, a Corporation.

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## MEMORANDUM IN SUPPORT OF PETITION FOR CERTIORARI.

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I, Wright Patman, as amicus curiae, respectfully pray that the petition of Bruce's Juices, Inc., for a writ of certiorari to the Supreme Court of the State of Florida to review the decision and judgment of the said Court in the above entitled case be granted.

I have no personal interest, of a financial character, in the outcome of this litigation. But the case presents federal issues of outstanding importance in law and public policy. The documents submitted to the United States Supreme Court reveal the effective denial to petitioner of the right to plead a violation of the Robinson-Patman Act in a suit in a state court. Such a denial seems to me to be contrary to the

intent of the Congress; to weaken the Act by taking away its most available remedy; to diminish the protection against monopoly which the Act throws about small business; and to impede the antitrust policy which the Act was meant to instrument. And the denial of the defense sought precludes a judgment on the substantive question of the legality of the price-structure of American Can Company and of the system of trade practices which attend it. To me it seems that the petitioner is entitled to his trial at law as to whether this system as it operates is lawful, or whether the scheme of quantity discounts is a cloak for a classification of customers on the basis of economic power which it was the very purpose of the Robinson-Patman Act to outlaw.

Therefore, I respectfully pray that the question of the validity of the defense interposed by petitioner be passed upon by the one Court in the land which can give it a definitive answer; and that, if it is held to be available, petitioner be accorded his opportunity to make good in court his contention that the trade practices of American Can Company operate in violation of the Robinson-Patman Act. It seems to me that the claims of law enforcement, independent business, and the system of free competitive enterprise unite in support of this plea.

Respectfully submitted,

WRIGHT PATMAN.

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No. 27

# In the Supreme Court of the United States

OCTOBER TERM, 1946

BRUCE'S JUICES, INC., PETITIONER

*v.*

AMERICAN CAN COMPANY

*ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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# In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 27

BRUCE'S JUICES, INC., PETITIONER

*v.*

AMERICAN CAN COMPANY

*ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

Of the various questions raised by the parties in this case, the Government will discuss only the question whether, in a suit in a state court to recover on promissory notes given by a purchaser of goods, the purchaser may plead the defense that the goods were sold to him at discriminatory prices in violation of the Robinson-Patman Act. This issue is of concern to the Government since the nature and scope of the remedies available to private parties injured by violations of the law have an important bearing upon the extent to which the Act is observed and the policies sought to be achieved by Congress are effectuated. Both the petitioner and the respondent seem to be in agreement that deter-

mination of the question whether violation of the Act is available as a defense under the circumstances presented in this case will be of far-reaching consequence.

The policy of fostering competition in interstate commerce has been declared by Congress in a series of acts known as the antitrust laws, of which the Robinson-Patman Act (49 Stat. 1526) is an integral part.[1] In recognition of the serious enforcement problem which these acts pose, Congress has provided a wide variety of remedies. Certain activities, including intentional discrimination in price between different purchasers,[2] are made criminal. Both the Government and private parties are authorized to bring suit in the federal courts to restrain violations of the prohibitory provisions of the Sherman Act and Clayton Act (including Section 2 as amended by the Robinson-Patman Act), and any person injured by reason of anything forbidden by these acts may bring suit in the federal courts for the recovery of treble damages.[3]

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[1] Section 1 of the Act amends Section 2 of the Clayton Act, Section 2 deals with pending litigation and outstanding orders of the Federal Trade Commission based on Section 2 of the Clayton Act, and Section 3 makes criminal, under certain conditions, price discriminations and sales at unreasonably low prices.

[2] Section 3 of the Robinson-Patman Act (15 U. S. C. 13a).

[3] Sherman Act, Sec. 4 (15 U. S. C. 4); Clayton Act, Secs. 4, 15, 16 (15 U. S. C. 15, 25, 26). The Federal Trade Commission is also given jurisdiction to bring administrative proceedings to prohibit violations of the Clayton Act (Clayton Act, Sec. 11, 15 U. S. C. 21).

The antitrust laws do not expressly grant to one injured by a violation the right to interpose such violation as a defense to a suit by the violator. But the validity of such a defense was early recognized as against the contention that the enforcement provisions embodied in the Sherman Act provided exclusive remedies for violation of that Act. *Bement* v. *National Harrow Co.*, 186 U. S. 70, 87.

A violation of the antitrust laws does not, by that fact alone, make the violator a pariah unable to enlist the aid of the courts under any circumstances, however unrelated to his violation. Two leading cases form the framework for determining the propriety of a defense based upon the plaintiff's violation of the antitrust laws. In *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, where the seller of goods brought suit upon notes given on account of the purchase, a defense that the seller was a party to an illegal combination in restraint of trade forbidden by the Sherman Act was rejected upon the ground that the sales contracts on which suit was brought were collateral to this illegal combination and were therefore enforceable. In *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 212 U. S. 227, where the suit was to recover a balance owing for goods sold and delivered, the Court upheld the defense that the sale of these goods was in furtherance of and in execution of a combination formed by the seller

and others, to restrain and monopolize interstate commerce. This Court declared (p. 261): "If judgment be given for the plaintiff the result, beyond all question, will be to give the aid of the court in making effective the illegal agreements that constituted the forbidden combination." The Court said further (p. 262) that failure to allow the defense set up by the purchaser would be a departure from the long-established rule that a court will not lend its aid "to a party seeking to realize the fruits of an agreement that appears to be tainted with illegality."

In several recent cases this Court has permitted private litigants to invoke the policy of the antitrust laws in limitation of rights asserted by the plaintiff, because of the public interest deemed to be subserved thereby.* But the broad principle underlying the *Wall Paper* case is not confined to cases in which the defense is based on violation of the antitrust laws. A court which enforces any illegal contract becomes a party to such illegality; and judicial forbearance in such circumstances serves the additional practical purpose of helping reduce the number of illegal contracts which might otherwise be made. *McMullen* v. *Hoffman*, 174 U. S. 639, 669–670.

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* *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661; *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173; *B. B. Chemical Co.* v. *Ellis*, 314 U. S. 495; *Morton Salt Co.* v. *Suppiger Co.*, 314 U. S. 488.

In the light of the foregoing general principles, we return to the question whether in a suit in a state court to recover the purchase price of goods sold and delivered, the purchaser may assert as a defense that the goods were sold to him at discriminatory prices in violation of the Robinson-Patman Act. Preliminarily, it may be observed that this is clearly a question of federal law. What constitutes a violation of a federal statute, and the legal implications of such violation, depend upon federal law, whether the forum be a federal or state court. This principle is too well established to require documentation, but for applications of it involving the antitrust laws, see *Bement* v. *National Harrow Co.*, 186 U. S. 70, and *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173. The Robinson-Patman Act is as much the law of the State of Florida as its code of domestic relations; and whether the contractual liability of a Florida defendant in a Florida court is affected by the circumstance that the contract on which the suit is based is in violation of the Robinson-Patman Act depends, ultimately, upon the proper construction to be given that Act. Congress might explicitly have incorporated into the Act the settled judicial principle that no court, federal or state, should lend itself to the enforcement of contracts in violation of the antitrust laws. On the other hand, Congress might conceivably have provided that the remedies expressly specified in

the antitrust laws should be exclusive, and that a violation of such laws should be immaterial in determining the rights and liabilities of private parties *inter se*. Or Congress might have adopted a neutral position by providing that the states should be wholly free to devise their own policy as to whether the facilities of their courts are to be used for the enforcement of agreements unlawful under the Robinson-Patman Act, and that the Act should place the states under no compulsion whatsoever in this regard. For reasons which we shall state shortly, it is our view that the Robinson-Patman Act is to be construed as permitting a defense based upon violation of its provisions; but, at all events, the availability of such a defense is clearly a federal question for determination by this Court.

The question for decision divides itself into two parts:

(1) Is this a suit to enforce a contract which is illegal under the Robinson-Patman Act, or is it based upon a cause of action collateral to the plaintiff's alleged violation of the statute?

(2) If the former, to what extent does the Robinson-Patman Act affect the enforcement by state courts of contracts in violation of its provisions?

(1) As to the first question, it should be noted that petitioner's answers alleged that the notes on which suit is brought evidenced the purchase

price of goods sold to it in violation of Section 3 of the Robinson-Patman Act (15 U. S. C. 13a)[5] and Section 2 of the Clayton Act as amended by the Robinson-Patman Act (and particularly subdivision (a) thereof (15 U. S. C. 13 (a)).[6] The former section makes it unlawful knowingly to discriminate against competitors of a purchaser by granting to the purchaser discounts or rebates not available to his competitors, and Section 2 (a) of the Clayton Act makes it unlawful to discriminate in price between different purchasers of commodities of like grade and quality.

Essentially what is prohibited by each section is sale of goods to different purchasers at different prices. The prohibited price discrimination is not limited to contracting to sell at varying prices but includes collection of the agreed higher and lower sales prices. Accordingly, when goods have been concurrently sold at different and discriminatory prices, a suit to recover the purchase price is not only based on an illegal sales agreement but is an attempt to enlist the aid of the courts in doing what the statute prohibits, that is, collection of different and discriminatory prices from differ-

[5] See the second, third, fourth, eighth, and ninth pleas to the declaration in Case No. 23454–L (R. 5–7, 10–12) and the third, fourth, and fifth pleas to the declaration in Case No. 23569–L (R. 43–45).

[6] See the first and sixth pleas to the declaration in Case No. 23454–L (R. 4–5, 8–9) and the first plea to the declaration in Case No. 23569–L (R. 41–42).

ent purchasers for goods of like kind and quality. The cause of action is clearly not collateral to the seller's illegal conduct since the very judgment which is sought falls within the area of illegality defined by the statute. The fact that the suit does not embrace all elements of the plaintiff's offense appears to be immaterial. Sale at the higher price being, like sale at the lower price, a part of the offense, any court giving judgment for the higher sales price is aiding in the commission of the offense.

(2) The question whether Congress, when it passed the Robinson-Patman Act, intended that those injured by its violation should be confined to such relief as the antitrust laws expressly provide would seem to be conclusively answered by the decisions previously cited, holding that the specific statutory remedies for enforcement of the Sherman Act do not limit the application of the more general rule that courts will not entertain a suit which is shown to be grounded upon and in execution of an illegal agreement (*supra*, pp. 3–4). As to the criminal provisions of Section 3 of the Robinson-Patman Act, there is even less reason than in the case of the Sherman Act for concluding that Congress intended the statutory remedy to be exclusive.[7] Likewise, when the Robinson-Patman Act amended Section 2 of the Clayton Act by extend-

[7] If, as seems clear, Section 3 falls within the words "antitrust laws" as defined in Section 1 of the Clayton Act (15 U. S. C. 12), the sanctions are the same as those of the Sher-

ing its coverage but made no change in the existing remedies for enforcement of that and other sections of the Clayton Act, whatever rights of defense were available in a suit in which the cause of action was grounded upon the plaintiff's violation of the Clayton Act were as much available after the amendment of Section 2 as before. As to such right of defense, the decisions previously cited dealing with the Sherman Act must be deemed controlling. The two statutes are in *pari materia,* the later one supplementing prohibitions of the earlier one by providing for outlawing in their incipiency certain conduct which was thought likely to lead to the restraints of trade and monopolies against which the Sherman Act is directed. *Standard Fashion Co.* v. *Magrane-Houston Co.,* 258 U. S. 346, 356.

The respondent appears to argue that policy considerations dictate a different conclusion. Starting from the premise that the question whether the Robinson-Patman Act has been violated is of great economic complexity, the respondent concludes that this determination, if not beyond the competence of the courts, is at least one with which they should not be burdened. But Congress clearly did not intend to remove this question from the courts, which

man Act. But if Section 3 is not within these words, the only sanction is the criminal penalty for violating the section, whereas Congress has provided that the Sherman Act may be enforced by criminal proceedings, by civil proceedings to enjoin future violations, and by triple damage suits to recover thrice the injury caused by past violations.

must pass upon the question in proceedings to enjoin violations of Section 2 of the Clayton Act and in triple damage suits for the recovery of injury caused by violation of that section. In addition, it would be strange that a defense to an action, however meritorious in itself, should be unavailable merely because it poses difficult and complex questions.

The respondent argues that state courts do not constitute a convenient or appropriate forum for trying questions as to violation of the Robinson-Patman Act. No such ground, however, was given by the Supreme Court of Florida in rejecting petitioner's defense. In passing upon this argument, the Court should bear in mind that if the defense asserted by petitioner is not available, the only recourse of those injured by prior violations of the statute is a treble-damage suit in a federal district court. The question of the convenience of the forum therefore presents, not a choice between administrative and judicial determination of the issue of violation, but choice between the treble-damage suit in a federal court as an exclusive or nonexclusive medium for trying this issue. In a treble-damage suit the injured party must establish not only the defendant's violation of the Act but also the extent and nature of the plaintiff's injury, the jurisdiction of the court, and that the statute of limitations does not bar the action. A forum in which any or all of these additional issues may have to be tried, and a forum in which the recovery sought in-

cludes the element of punitive damages, does not appear to be either more convenient or appropriate than the forum provided when suit is brought, either in a state or federal court, to enforce an obligation arising out of violation of the statute.

The only remaining question is whether, in a suit in a state court, the right to interpose plaintiff's violation of the Act by way of defense is affirmatively secured to the defendant by the federal law, or is left by that law to be determined in accordance with state policy. The question was dealt with in *Bement* v. *National Harrow Co.*, 186 U. S. 70, which was a suit brought in a state court to enforce a contract. The state court rejected the defense that the contract violated the Sherman Act, and this Court affirmed upon the ground that the contract did not, upon the evidence presented, violate the Sherman Act. But this Court asserted in unqualified terms, presumably as a matter of federal law, the right to make such defense in the state courts. The Court said (p. 88) that "any one sued upon a contract may set up as a defence that if is a violation of the act of Congress, and if found to be so, that fact will constitute a good defence to the action." The Court also said (*ibid.*): "As the statute makes the contract in itself illegal, no recovery can be had upon it when the defence of illegality is shown to the court." The Court further said (*ibid.*) that the provision by Congress of certain statutory remedies against violators "does not prevent a

private individual when sued upon a contract which is void as in violation of the act from setting it up as a defence."

Any remaining doubt on the question seems to be set at rest by *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173. That case held that where the doctrine that a licensee of a patent is estopped to challenge the validity of the licensed patent is invoked so as to conflict with the Sherman Act's prohibition of price fixing, "this Court may resolve the question even though its conclusion be contrary to that of a state court". The Court, after referring to the *Bement* case, the *Wall Paper* case and other authorities, said (p. 177):

> Local rules of estoppel which would fasten upon the public as well as the petitioner the burden of an agreement in violation of the Sherman Act must yield to the Act's declaration that such agreements are unlawful, and to the public policy of the Act which in the public interest precludes the enforcement of such unlawful agreements.

The state courts have consistently upheld the right to interpose as a defense that the plaintiff's cause of action is grounded upon an agreement or transaction prohibited by the Sherman Act,[8] the Clayton Act[9] or Section 2 of the Clayton Act as modified by the Robinson-Patman Act.[10]

The Government submits that, for the reasons stated, the petitioner was entitled to plead respondent's violation of the Robinson-Patman Act

See footnotes on opposite page.

by way of defense to the suits brought against it in the Florida courts. The question whether recognition of the defense asserted by petitioner might work inequities as between the parties would seem to lie outside the issues before this Court. In any event, we do not suggest that such recognition implies that the respondent could not recover on a *quantum meruit* basis.

Respectfully submitted.

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WENDELL BERGE,
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OCTOBER 1946.

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[9] *Morey* v. *Paladini*, 187 Cal. 727; *Patterson* v. *Imperial Window Glass Co.*, 91 Kans. 201; *Schill* v. *Remington-Putnam Book Co.*, 182 Md. 153; *Stewart* v. *W. T. Rawleigh Medical Co.*, 58 Okla. 344. Cf. *Butterick Pub. Co.* v. *Mistrot-Munn Co.*, 153 N. Y. S. 61, affirmed, 217 N. Y. 678—defense of violation of antitrust act of another state; *Kissel Motor Car Co.* v. *Walker*, 270 Fed. 492 (C. C. A. 5)—violation of state antitrust law.

[10] *Ainsworth* v. *Cooper Underwear Co.*, 237 N. Y. S. 301; *Remington Rand, Inc*, v. *International Business Mach. Corp.*, 3 N. Y. S. 2d 515.

[11] *Body-Steffner Co.* v. *Flotill Products*, 63 Cal. App. 2d 555; *Merchants Service Corp.* v. *Libby, McNeill & Libby*, 314 Ill. App. 121; *F. W. Stock & Sons, Inc.* v. *Jacobson*, 18 N. Y. S. 2d 200. *Contra, Progress Corp.* v. *Green*, 298 N. Y. S. 154.

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CLERK

IN THE

# Supreme Court of the United States

No. 402 27

BRUCE'S JUICES, INC., *Petitioner*

*vs.*

AMERICAN CAN COMPANY

## PETITION FOR RE-HEARING AND FOR STAY OF MANDATE

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IN THE

# Supreme Court of the United States

No. 402

BRUCE'S JUICES, INC., *Petitioner*

*vs.*

AMERICAN CAN COMPANY

## PETITION FOR RE-HEARING AND FOR STAY OF MANDATE

*To the Honorable Justices of the Supreme Court of the United States:*

Bruce's Juices, Inc., petitioner in this cause, respectfully presents its petition for re-hearing, and submits as grounds therefor the following:

The importance of this litigation is not restricted to the litigants nor to the canning industry, but the legal principles involved directly, and vitally, affect substantially the entire field of enterprise engaged in the purchase or sale of commodities in appreciable volume. While the determination of the questions incident to this case inherently affects the policies, trade practices and financial welfare of all who are within the sphere of the Anti-Trust laws, the group which

is most vitally affected thereby is composed of those who rely upon such laws for protection.

Even in the initial stage of this cause, the attention of the canning industry was focused upon the unusual legal questions presented and the temerity of Bruce's Juices, Inc., in challenging the practices of the American Can Company. This interest was greatly intensified upon the handing down of the first opinion of the Florida Supreme Court (R. 593-601) wherein the principle was enunciated, upon the authority of the decisions of this Court, that a vendor, guilty of violation of the Robinson-Patman Act, cannot effect recovery of the purchase price of the merchandise sold where the transaction is tainted with such illegality.

While the principle was not new, inasmuch as this Court had long before enunciated a like doctrine under the earlier Anti-Trust laws, its decisions had largely been ignored by those concerns whose practices such laws sought to control. That equally scant attention had been given to the Robinson-Patman Act by many in the industrial world has long been common knowledge. The attention of both sellers and buyers, in many and varied industries was, therefore, sharply centered upon the outcome of this litigation and profound interest was evidenced in the well reasoned, and amply supported, conclusion stated in the first opinion of the Florida Court. But clarity of precedent ended and the law was plunged into confusion by the ambiguous and ill-considered subsequent opinion of that Court (R. 621). The result of the thirty-one word per curiam statement was to affirm judgment against petitioner, without, in any wise, challenging the principles which had theretofore been categorically enunciated.

Certiorari was granted by this Honorable Court, briefs were filed, arguments had and an appreciable portion of the industrial world confidently looked to this Court to end the confusion and to settle, once and for all, the real practical effect of the Robinson-Patman Act, upon which the small merchant had relied as a bulwark of protection against unfair trade practices. Then the decision of this Honorable Court, "Judgment affirmed by an equally divided Court", and again the rights of all parties affected by this Act were shrouded in doubt and confusion was multiplied. While the affirmance of the judgment affects only petitioner, the failure of this Court to enunciate authoritative precedent is of vital and serious moment to a very substantial segment of industry. No one is advised as to the nature of the question or questions upon which this Court has divided and consequently speculation and conjecture are rampant.

One result of the presently existing state of chaos is clear beyond doubt - - a flood of litigation will follow as those believing themselves to be victims of illegal price discriminations and practices seek every possible redress. An almost equally unfortunate effect of the existing uncertainty of precedent is the situation in which vendors, within the scope of the Act, are placed, i.e., complete inability to determine whether any particular policy, with reference to allowance of quantity discounts will be condemned by the Courts. Inevitably many entirely lawful trade practices of numerous manufacturers will be unnecessarily challenged. This condition of turmoil will continue, as likewise will the heavy burden of additional litigation, until such further time as the questions once again reach this Court and are here, once and for all, conclusively settled. Years will, in all probability, elapse before some other courageous victim of what he believes to be discriminatory practices is financially able,

willing and successful in treading the hazardous, expensive and nerve-racking road which leads to this Tribunal.

Petitioner has overcome many and serious obstacles along this road, with the end in view not alone of escaping from, what to it appears an unjust judgment, but likewise with the hope of securing an answer for its small business colleagues, to questions, which in many instances, means the difference between survival and financial demise. With all deference petitioner respectfully submits that it has brought here questions of such moment and significance in the commercial world as should not, until and unless every effort has been exhausted, meet the fate of a legal stalemate. That the questions are of public concern is a matter of common knowledge in the canning industry, and is borne out by the discussion which has been had in trade journals and similar publications. (See Appendix)

The nature of this case was, in our opinion, soundly stated by the Honorable Wright Patman, in his memorandum in support of petition for certiorari, as amicus curiae;

> "'The case presents Federal issues of outstanding importance in law and public policy",

and further:

> "I respectfully pray that the question of the validity of the defense interposed by petitioner be passed upon by the one Court in the land which can give it a definitive answer".

We are sincerely of the conviction that further argument and consideration will prove of assistance in enabling this Honorable Court to reach a majority decision. Necessarily re-argument would accomplish such result if same be

deferred until a full Bench is available. The resultant delay would be relatively unimportant and particularly is this true when consideration is given to the period over which this litigation has already extended and to the length of time which necessarily must elapse before the questions can again be lodged here. Such delay would prove to be the quickest method of providing a legal compass to guide the public, as well as the legal profession, through the presently uncharted sea.

We have not urged the position in which the petitioner finds itself, as ground for the granting of this motion, although we feel this should not be entirely overlooked. We have endeavored to point out the condition in which industry, large and small, manufacturer and purchaser, has been placed by the extraordinary course and present status of this litigation. The law, as previously announced by this Court, with reference to portions of the Anti-Trust laws — the Sherman and Clayton Acts — has become beclouded by this litigation. It is now uncertain whether the prior decisions have been modified or overruled. Likewise the effect, application and construction of the Robinson-Patman Act have been befogged and obscured by the anomalous second opinion of the Florida Court. The division of opinion in this Honorable Court has intensified the confusion.

It is, therefore, respectfully prayed that re-hearing be granted and after re-argument that this Honorable Court make further effort to enunciate authoritative precedent for the needed guidance of industry. Such precedent, whatever it may be, will, in our opinion, be greatly for the common good.

Should the foregoing motion be denied, petitioner respectfully shows unto the Court, as ground for the alternative askings hereinafter set forth, the following:

The result, should this Court follow its usual practice — where its members are equally divided — of affirming the judgment below, is unique, and of first impression, insofar as our research has disclosed.

The above assertion is predicated upon the assumption that the majority of the members of this Court are of the opinion that the determinative and controlling issue is the availability, vel non, of the defense, in a state court, of the violation of the statute and upon this question the Court has divided. If such be true, then the necessary and inevitable effect of the affirmance of the judgment would be, paradoxically, to reverse the expressed opinion of the majority of the Florida Court upon the controlling issue. That this is true is conclusively established by the history of the case in said Court:

1. In the first opinion, five members of the Court categorically held the defense available. Of the two dissenting members, Judge Terrell expressed no reason for so doing. The apparent effect of the language employed in Judge Buford's opinion was to approve the defense as he said: "I dissent because I think the sales contract which constituted a part of the plea was free of discrimination and *therefore the pleas were of no avail*", (R. 601) (Emphasis supplied)

2. Pursuant to re-hearing, (a) Judges Terrell, Brown and Buford voted for affirmance of judgment against petitioner upon the sole ground that the defense was not available *"under the facts submitted in evidence"*. (Emphasis

supplied), (b) Judges Chapman, Thomas and Adams dissented from the second opinion and adhered to the original opinion, (c) only Judge Sebring held the defense not available, and concurred in the majority second opinion solely upon that ground.

3. Therefore, the record discloses that a minimum of four members of the Florida Court have never departed from the conclusion and holding that the defense of the violation of the statute is available. *

Thus, should this Court permit the affirmance of judgment, petitioner will find itself in the anomalous situation of being subjected to judgment by reason of the division of opinion in this Court, notwithstanding that on the sole determinative issue but one member of the Florida Supreme Court has held against petitioner. Therefore, actually, this Court will reverse, by its failure to agree, the clear holding of the majority of the Court below and will thereby deprive petitioner of its Federal right to defend the action upon the ground of the violation of the Robinson-Patman Act.

To the end that such miscarriage of justice will not eventuate from the division of this Court, petitioner, therefore, respectfully prays:

(1) That the mandate or order of this Court be issued to the Supreme Court of Florida in such form as to require and direct said Court to enforce the conclusion and opinion expressed and held by a majority of the members thereof that the defense of violation of the Robinson-Patman Act is

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* Judges Chapman, Thomas, Adams and Brown. (Apparently Judge Buford likewise was of said opinion. The views of Judge Terrell on this issue were never reflected.)

available, and that this Court further order and direct the Court below to enter such order or judgment as will reverse the judgment of the trial Court and remand the cause for further proceedings consistent with the preservation to petitioner of the Federal right to interpose as a defense the violation of the statute.

(2) That this Court order, direct or request, as it may be advised, the Supreme Court of Florida to declare and state its determination and conclusion as to the availability, in the Florida Courts, of the defense of violation of the Robinson-Patman Act and that this Court thereafter consider and finally determine this cause in the light of such further opinion, declaration, or statement, as may be made by the Supreme Court of Florida.

(3) In the event of the denial of each of the askings hereinbefore made, then petitioner respectfully prays this Court to voice and express by opinion, or otherwise, the question or questions, which, in its judgment, is or are, determinative of this cause and upon which it has divided, to the end that the Supreme Court of Florida may be advised thereof and may, if it sees fit, further consider and adjudicate same.

Respectfully submitted

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I, counsel for Bruce's Juices, Inc., petitioner, do hereby certify that the foregoing petition for re-hearing of this cause is presented in good faith and not for delay.

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CODY FOWLER,
*Of Counsel* for Bruce's Juices, Inc.

# APPENDIX

The following article appeared on January 9th, 1946, in the AMERICAN GROCER, 90 West Broadway, New York 7, N. Y., a weekly journal of the food industry, of nationwide circulation:

"BRUCE'S JUICES CHAMPIONS SMALL BUSINESS

"Small and independent businessmen throughout the country and war veterans planning on starting their own business enterprises, are eagerly awaiting the outcome of a case to be argued before the United States Supreme Court on January 10th. It is the story of David and Goliath all over again, with Bruce's Juices, Inc., an independent fruit and vegetable canning company in Tampa, Florida, fighting the gigantic American Can Company.

"With trust-busting Thurman Arnold, recently resigned Circuit Court of Appeals judge and former Assistant Attorney General in charge of the Anti-Trust Division of the Department of Justice, as its attorney, Bruce's Juices charges that it was discriminated against on canning prices.

"Bruce's Juices claims that while it bought as many cans from the Tampa factory of the American Can Company as the local plants of much larger canning companies, the big concerns on the basis of aggregate purchases from the American factories all over the country, were granted a discount which was not given to the independent concern. The suit charges that this is a violation of the Robinson-Patman Act, and Representative Wright Patman, Chairman of the Housing Committee to investigate and study problems of small

business, was instrumental in getting the Supreme Court to hear the action.

> "If Bruce's Juices wins the litigation, it will mean that small and independent businessmen are 'in for a break' on the prices of materials purchased from companies with branch factories. — National Industries News service."

The same article in substance appeared in numerous weekly publications widely scattered throughout the country, among them being: Keansburg, N. J. News, January 11, 1946; Middletown Delaware Transcript, January 17; Pt. Jefferson, N. Y. Record, January 17; Chicago Federation News, February 2; Greensboro, N. C. Patriot, January 10; Carbondale, Illinois Daily Free Press, January 18; Lowell, Mass. Optic, January 12; Hawthorne, N. J. Press, January 24; Oklahoma City Daily Live Stock News, January 17; Chatom, Ala. News, January 17; Medina, N. Y. Daily Journal-Register, January 11; Whiting, Ind. Times, January 11.

In the January 14th issue of "The Canning Trade", Baltimore, Maryland, a long established journal devoted to the canning and allied industries, the following statement was made:

> "AN IMPORTANT SUIT — As we write there is scheduled to be presented to the United States Supreme Court a suit that might easily be all important. It is the suit of Bruce's Juices, Tampa, Fla., vs. the American Can Company. The special Correspondent of the N. Y. Journal of Commerce, at Washington, explains it well.
>
> " 'WASHINGTON, Jan. 8.—Canning trade interests throughout the nation will be watching carefully the outcome of a case to be placed before the United States Supreme Court here tomorrow — that of Bruce's

Juices, Inc., of Tampa, charging the American Can Co. with violation of the Robinson-Patman Act. The canner earlier had won the decisions in lower court bouts.

" 'Bruce's claims American Can gave illegal discounts on can prices to Florida units of large canning companies.

"Thurman Arnold, recently resigned Circuit Court of Appeals judge and former head of the Department of Justice's Anti-Trust Division, will make his first courtroom appearance since resuming private law practice, arguing the case for Bruce's.

## PATMAN TO PARTICIPATE

" 'An unusual feature of the case is that Congressman Wright Patman, co-author of the Robinson-Patman Act and chairman of the House Small Business Committee, appears as "amicus curiae." He has informed the court that the case "presents Federal issues of outstanding importance in law and public policy.'

" 'In urging the high court to hear the case, Congresman Patman said, "It seems to me that the claims of law enforcement, independent business, and the system of free competitive enterprise unit in this plea."

" 'The action revolves around the refusal of Bruce's Juices, Inc., to pay on promissory notes held by the American Can Co. on the grounds of price discrimination. J. Adams Bruce, head of the canning firm, said that, while his purchases from American's Tampa factory were as large as those of the local units of large canning corporations, his competitors received discounts because of aggregate purchases from American's factories all over the country.

"FURTHER CASES SEEN

"'If Bruce's Juices wins the case there is a possibility that damage suits running into millions of dollars will be filed against American Can by independent canners throughout the country. Such a decision would also indicate that the present method of granting discounts on aggregate sales to chain production units would have to be abandoned and prices would be rated on purchases from individual factories.

"'In attacking the present system, Mr. Bruce said: "The practice of basing discounts upon aggregate purchases instead of upon orders filled from a single plant does not correctly reveal differences in costs. This system is a compulsion toward the absorption of small independent firms by the nation-wide corporation".'"

As a further reflection of the widespread interest in this cause, we quote from "Printers Ink" under date of January 25, 1946:

"Can discounts for cans be canned?

"BUSINESS WILL WATCH closely the suit of Bruce's Juices, canned citrus juice, Tampa, vs. American Can Co. when it is heard by the Supreme Court Jan. 28. J. Adams Bruce, president, contends that the Tampa factory of American Can should give him the same discounts it gives local plants of national canners. If Bruce wins (his attorney is Thurman Arnold) about 2,000 other canners may also sue American Can."

In the February 21 issue of the "Commercial and Financial Chronicle", an article was carried under the caption, "Supreme Court Fails to Clarify Robinson-Patman Act" in which the first paragraph reads:

"Last week abortive tie vote 'no decision' handed down by the United States Supreme Court in the case of Bruce's Juices vs. American Can Company leaves independent canners and producers in a quandary over some important parts of the Robinson-Patman Act".

IN THE

# Supreme Court of the United States

No. 402

BRUCE'S JUICES, INC., *Petitioner*

*vs.*

AMERICAN CAN COMPANY

## MOTION TO STAY ISSUANCE OF MANDATE

Now comes Bruce's Juices, Inc., the petitioner in the above entitled cause, and shows unto the Court as follows:

1. Petitioner is herewith filing its petition for a re-hearing of this case for the purpose and reasons set forth in said petition;

2. Under Rule 34 of this Court, such petition will not operate to stay the Mandate or other process except by special order of the Court; and under Rule 33, such Mandate or other process will issue, as of course, after expiration of twenty-five (25) days from date of the judgment of this Court unless otherwise ordered;

3. In view of the nature of such petition for re-hearing and the end sought to be accomplished thereby, no useful purpose would be subserved if the Mandate or other process

of this Court should issue before the Court has disposed of such petition, but would cause unnecessary complications and delay.

WHEREFORE petitioner prays that:

The Mandate of this Court be stayed and withheld until the Further order of this Court.

DATED day of March, A. D. 1946.

CODY FOWLER,
FOWLER & WHITE,
Tampa, Florida,

R. W. SHACKLEFORD,
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CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945.

No. 27

BRUCE'S JUICES, INC., a Corporation, *Petitioner*,

v.

AMERICAN CAN COMPANY, a Corporation.

## MOTION FOR LEAVE TO FILE AND MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING AND FOR STAY OF MANDATE AS AMICUS CURIAE.

WRIGHT PATMAN.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945.

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No. 402.

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BRUCE'S JUICES, INC., a Corporation, *Petitioner,*

v.

AMERICAN CAN COMPANY, a Corporation.

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## MOTION FOR LEAVE TO FILE MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING AND FOR STAY OF MANDATE AS AMICUS CURIAE.

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Wright Patman, who was given leave to appear as amicus curiae in support of a petition for certiorari in the above entitled case, respectfully moves for leave to file the following statement as amicus curiae in support of the petition for rehearing. The respondent has been notified of this motion by mailing to it a full copy and a copy of the statement.

Respectfully submitted,

WRIGHT PATMAN.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945.

---

No. 402.

---

BRUCE'S JUICES, INC., a Corporation, *Petitioner*,

v.

AMERICAN CAN COMPANY, a Corporation.

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## MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING AND FOR STAY OF MANDATE.

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I, Wright Patman, as amicus curiae, respectfully pray that the petition of Bruce's Juices, Inc., for a rehearing in this cause be granted. The case presents several issues of outstanding importance which require a definitive answer by the Supreme Court of the United States. The affirmance of the judgment below by a four to four decision leaves the enforcement of the important economic policy of the Robinson-Patman Act in confusion and doubt.

Respectfully submitted,

WRIGHT PATMAN.

# SUPREME COURT OF THE UNITED STATES

No. 27.—October Term, 1946.

| | |
|---|---|
| Bruce's Juices, Inc., Petitioner, v. American Can Company. | On Writ of Certiorari to the Supreme Court of the State of Florida. |

[April 7, 1947.]

Mr. Justice Jackson delivered the opinion of the Court.

The federal question which survives proceedings in the Florida state courts is whether renewal notes representing the purchase price of goods sold and delivered are uncollectible if it is found that the vendor violated the Robinson-Patman Act, 49 Stat. 1526, 1528; 15 U. S. C. §§ 13, 13a.

Bruce is a canner and, over a period of years, bought its cans chiefly from The American Can Company. A debt accumulated which was put into promissory notes and on one or more occasions they were renewed, reduced by amounts which had been paid. Upon eventual default, two suits, later consolidated, were brought on renewal notes aggregating about $114,000. As to each note, Bruce pleaded in defense that "the consideration for said notes is illegal and said notes void and of no force and effect." This was said to be for the reason that the Can Company had sold to others at prices which discriminated against Bruce and thereby violated the Robinson-Patman Act.

The alleged discrimination chiefly relied upon consisted of quantity discounts. Annual purchases by Bruce were about $350,000. Some other canners bought much larger quantities. The Can Company's contract with all its customers allowed a discount of 1% on annual purchases of $500,000, and nothing to those whose purchases

were less than that. It was so graduated as to give a maximum discount of 5% to a customer whose purchases were $7,000,000 a year. The consequence is that relatively small packers pay 5% more for their cans than their largest competitors.

It is claimed that this advantage to quantity buyers renders the quantity discount *per se* a violation of the Robinson-Patman Act. To sustain the defense in this case it would be necessary to so hold. It is not denied that Bruce got the same discounts as other purchasers of like quantities when it qualified, and in one year Bruce was in the $500,000 bracket and received the 1% discount. It is not claimed that the Can Company failed to give discounts where earned under this uniform contract, or that discounts were given where not so earned. Bruce received the same discounts as others within its classification and it is not questioned that had it been a purchaser of larger quantities it would have been allowed the same discount as other purchasers of that class.

Before a court could sustain the defense in this particular case, it would also have to overcome other difficulties of law and fact. The Act does not prohibit all quantity discounts but expressly permits them under certain conditions. It indicates, too, that the Federal Trade Commission is the appropriate tribunal to hear in the first instance the complicated issues growing out of grievances against a quantity discount practice of a seller. 49 Stat. 1526; 15 U. S. C. § 13 (a). Quantity discounts are among the oldest, most widely employed and best known of discount practices. They are common in retail trade, wholesale trade, and manufacturer-jobber relations. They are common in regulated as well as unregulated price structures. Congress refused to declare flatly that they are illegal. They become illegal only under certain conditions and when they are illegal it is as much a violation to accept or receive as to allow them. Bruce, in

one of the years included in its balance of account, purchased more than a half million dollars of cans on which it received precisely the kind and amount of discount it now asserts to be illegal.

The argument is made that such a remedy as Bruce seeks here would support the anti-monopoly policy of Congress. But Bruce is not complaining of the high price of cans. Bruce complains of a lower price for cans to others—which would enable competitors to put their products on the market cheaper. This may well put Bruce to some disadvantage, but it does not follow that Congress would forbid the savings of large-scale mass production to be passed along to consumers. The economic effects on competition of such discounts are for the Trade Commission to judge. Until the Commission has determined the question, courts are not given guidance as to what the public interest does require concerning the harm or benefit of these quantity discounts on the ultimate public interests sought to be protected in the Act. It would be a far-reaching decision to outlaw all quantity discounts. Courts should not rush in where Congress feared to tread.

Because of a more fundamental defect in petitioner's case, however, the Court does not find it necessary to consider the effect of these features of the Act on this case, as would be necessary before a conclusion could be reached that petitioner should win on the merits. On the questions of fact, considerable evidence was taken at pre-trial hearings and the parties are in dispute as to whether the decision thereon was a final judgment and, if so, as to whether the defense was not also adjudicated to be insufficient on the facts. Although the record is unsatisfactory, we take it that all of the sales evidenced by the notes were made after the passing of the Robinson-Patman Act. It appears, however, that the notes are not identified with any particular sale but represent a balance remaining on a running account of sales and credits in many of which

a claim of discrimination might not be supportable. The indebtedness they supplant is conceded to have been incurred before February, 1940. The purchases covered at least a four-year period and involved two types of cans. The purchase price which Bruce asks us to excuse it from paying is not identified either as to type of can or date of transaction. But petitioner contends that it is not necessary in proving a discrimination to show that others received a different discount on the same type of can at approximately the same time "because the scheme of discount by aggregate dollar volume of annual sales comprehends all cans bought whatever their size or price." To sustain this position would mean that a sale to a competitor of large cans in 1940 at a higher discount invalidated a sale of small cans to petitioner in 1936 so that petitioner need not pay the contract price for cans delivered that year. The contention is simply that if some purchasers got larger discounts on any bill for cans than petitioner got, the bill against petitioner and notes in settlement and extension of it are uncollectible.

However, for the purposes of this decision, in view of the uncertain nature of the proceedings below, we assume, but do not decide, that the defense on the facts has been or could be established as pleaded. We do not decide whether the quantity discount plan, whatever the facts were, violated the Robinson-Patman Act. The sole question we decide is whether notes given for purchases are unenforceable if the quantity discount plan violates the Act. Petitioner suggests that the Court may take two paths to the answer, but that the answer will be yes. The broad ground petitioner offers is "that a transaction unlawful under the Robinson-Patman Act constitutes criminal conduct upon which no money judgment can be based." Petitioner also offers a narrow ground on which we can yet decide in its favor. "But, if it be admitted that the buyer [sic] is entitled to the fair value of the

goods," petitioner says, respondent probably already has been paid the fair value of all the cans bought in 1936–40. When that value has been determined by the trial court, it urges, it will be found that the amount in notes is substantially equivalent to the amount of discrimination in discount.[1]

In effect, petitioner is treating the $114,000 in notes as representing the discount it claims it should have gotten on its 1937–42 purchases of $2,000,000. This alternative argument is that petitioner is liable only for the fair value of all the cans it bought, and in this suit it asks the courts to determine what that fair value was. But the fact is that as to the transactions for which petitioner paid $2,000,000 it has already paid the agreed price. Those transactions cannot be identified with particularity, but they were paid for at respondent's prices. Petitioner did not allege and does not contend that the notes represent specific transactions or that the sales for which they were given could be identified. Mr. Bruce conceded in his testimony that the notes simply represent a balance of an account which mingled the prices of individual transactions.[2] In its brief here, petitioner's only response to

[1] On petitioner's first theory, clearly no recovery on *quantum meruit* could be had. The general rule is that a transaction wholly illegal will not support such a suit. See Williston, Contracts (Rev. ed., 1938) §1786A; Restatement, Contracts, § 598, Comment c. And on Bruce's second theory, because of the leniency with which respondent extended credit, it would be impossible for respondent to show which cans the notes represent and it would of course be unable to establish their fair value. If we hold the notes uncollectible, therefore, respondent could not recover on *quantum meruit*, and Bruce would get a windfall.

[2] His testimony on this point follows:

"Q. Mr. Bruce, do the notes evidence the purchase price of any particular size of cans you purchased from the American Can Co.?

A. There is nothing on the face of the notes that shows what size they were.

Q. During that period you purchased a certain size can?

A. It was purchased during a certain period.

respondent's statement that "None of the original notes . . . had been tied to a particular transaction" is that "The record shows that all of the notes are tied to the entire series of transactions." There may be substantial equivalence numerically in the amount of the notes and the amount of alleged discrimination, but it cannot be said that the notes represent the separate item of price discrimination.[3]

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Q. Did you run a separate account on the grocery can and on the soft drink can, or small and large?

A. No sir.

Q. The notes themselves simply represent that account, irrespective of the size of the cans?

A. Yes sir, the blanket way.

Q. In a blanket way. In other words there was no distinction made in your account between the large and small cans, I mean in the indebtedness?

A. Not while the notes were accruing.

Q. In other words the notes in question are for the purchase price of both large and small cans?

A. That is right."

[3] If the notes are considered alternatively as representing respondent's price due on the latest purchases to that amount in late 1939 and early 1940, petitioner, on its theory, would be entitled to be excused payment of only about 5% of the $114,000, because it is defending on the ground that it ought not to pay the allegedly discriminatory part of the price. But even for this limited purpose, it cannot be established what cans the $114,000 represents, so the court could not determine their fair value.

In *Penn-Allen Cement Co.* v. *Phillips*, 182 N. C. 437, 109 S. E. 257, the specific sales were identified and the price unpaid. The court there held only that the buyer should be excused payment of the discriminatory part of the contract price. But the opinion was given after the court had decided that the appeal was prematurely taken.

The defendant had counterclaimed for treble damages, computed on the basis of the alleged overcharge. The plaintiff urged that treble damages could not be recovered in an action for the purchase price but that the defendant must pay first, and then sue on that claim. The court said simply, "This matter also has not been passed upon by the court below, and there is nothing for us to consider."

The Act prescribes sanctions, and it does not make uncollectibility of the purchase price one of them. Violation of the Act is made criminal and upon conviction a violator may be fined or imprisoned. 49 Stat. 1528, 15 U. S. C. § 13a. Any person who is injured in his business or property by reason of anything forbidden therein may sue and recover threefold the damages by him sustained and the costs of suit, including a reasonable attorney's fee. 38 Stat. 731, 15 U. S. C. § 15. This triple damage provision to redress private injury and the criminal proceedings to vindicate the public interest are the only sanctions provided by Congress.

It is contended that we should act judicially to add a sanction not provided by Congress by declaring the purchase price of goods uncollectible where the vendor has violated the Act. It may be admitted as argued that such a sanction would be an effective enforcement provision. Addressed to Congress, this argument might be persuasive, but the very fact that it would obviously be an effective sanction makes it even more significant that the Act made no provision for it; that no committee dealing with the Robinson-Patman Act proposed it; that not one word suggesting its consideration appears in the debates of Congress; no proponent of the Act pointed out in its favor that it would be self-enforcing because of this sanction; and no opponent pointed with alarm to the consequences of such a drastic sanction on the commerce of the nation. On the contrary, a proposed provision of the Act, passed only by the Senate which later receded, shows that Congress gave consideration to no

182 N. C. at 441, 109 S. E. at 259. But if the court was right in holding that plaintiff could not recover the overcharge, it would necessarily follow that the counterclaim should have been dismissed. For without paying the overcharge, the defendant would have had no basis on which to rest its claim that it had been damaged in that amount and therefore entitled to treble compensation.

sanction more extreme than to compel the remission of the excess charged. See S. 3154, § 2 (d), 74th Cong., 1st Sess., S. Rep. No. 1502, 74th Cong., 2d Sess., p. 8: Conference Rep., H. Rep. No. 2951, 74th Cong., 2d Sess., p. 8. Congress declined to adopt this relatively moderate provision and at no time does it appear that either house of Congress wanted to go so far as to permit a buyer to get goods for nothing.

Where the interests of individuals or private groups or those who bear a special relation to the prohibition of a statute are identical with the public interest in having a statute enforced, it is not uncommon to permit them to invoke sanctions. This stimulates one set of private interest to combat transgressions by another without resort to governmental enforcement agencies. Such remedies have the advantage of putting back of such statutes a strong and reliable motive for enforcement, which relieves the Government of cost of enforcement. Such private remedies lose, of course, whatever advantage there may be in the presumed disinterested, public interest standards and expertness of a governmental agency which has the initiative control of retributory measures. It is clear Congress intended to use private self-interest as a means of enforcement and to arm injured persons with private means to retribution when it gave to any injured party a private cause of action in which his damages are to be made good threefold, with costs of suit and reasonable attorney's fee.

Bruce, it appears, already has undertaken the triple damage suit remedy against the Can Company. *Bruce's Juices, Inc.* v. *American Can Co.*, No. 569, Civ. T., S. D. Fla., 1942. To indicate its need that the Court establish this additional remedy unauthorized by Congress, it seeks to discredit and belittle both of the remedies Congress has expressly authorized. It says, "The triple damage suit is likely to prove protracted and expensive; damages

caused by a disadvantageous competitive position are so speculative as to be usually unprovable. Nor can the buyer rely for protection upon the action of the government. The Department of Justice or the Federal Trade Commission may never get around to the matter." It is a little dubious whether the sort of remedy which has been in litigation over four years in this case which Bruce asks us to reverse and send back again, is an antidote for "protracted and expensive" triple damage suits. Moreover, if Bruce can in this suit prove that the prices respondent charged were illegal, as it must in order to win, it can do the same in a triple damage suit. The damages sustained because of discrimination are no more "speculative" nor "unprovable" in one suit than in the other, and their establishment in the statutory form of action carries a bonus.

Annexation of the proposed defense to the statute by implication either as an inference of unexpressed intention of Congress or as the result of some doctrine of common law, would be justified only if it would be at least a rational, nondiscriminatory and appropriate means of making the policy of the statute effective. To allow a buyer to get his goods for nothing because the seller violated the Act by giving someone else a greater discount, does not meet this test.

It would seem that one test of the rationality and appropriateness of such a defense because of a violation of the Act would be that the reparation it permits should be measured at least roughly by the extent of the injury caused by the violation. This, of course, is the principle of the suit for triple damages. But that is not the principle of the defense here urged. The extent of its indemnity is not measured by injury, and not measured by the dealings affected with the alleged violation. It is measured solely by the amount of credit the buyer obtained from the seller. The seller would lose the amount carried

in notes or in open account. Had Bruce's delinquency been greater, so would its gain; had there been no credit asked or given the buyer could have had no remedy by way of defense. The obvious consequence would be to discourage vendors from extending credit where the operation of this rather difficult statute is in doubt. Since the danger of loss under the proposed remedy is greatest in the case of small buyers who get small discounts, the consequence would be to deny the small buyers credit and trust only those who, having the largest discounts, would be least likely to defend on a claim of violation. This result would hardly comport with the argument, so much dwelt upon by petitioner, that its status is that of a small business concern trying to battle a business giant. But we cannot suppose that "little fellows" are always buyers and only giants sell goods. Bruce itself is a seller of canned goods and if its trade practices include quantity discounts, this "little" canner might be on the other side of the same issue trying to collect against a small wholesaler who had less discount than a larger one. To decide issues of law on the size of the person who gets advantage or claims disadvantage is treacherous.

This construction which would make a grant of credit a point of vulnerability could be avoided only by holding that the whole purchase price, not merely that involved in the credit, is uncollectible and recoverable even if voluntarily paid. In that case, the volume of the transaction, rather than the volume of the credit extended, would measure the loss a seller might suffer from violating the Act.

But, of course, if the discount system of the Can Company makes all of the Bruce purchases illegal and the price thereof recoverable, all sales to others under the discount system must be similarly tainted. It is hard to see how any of the Can Company's sales are valid if these to Bruce are void on the theory advanced. If this

view is taken, certainly the remedy would soon end illegal quantity business discounts—by ending the business. We do not believe Congress has contemplated so deadly a remedy or has left the way open to us by judicial edict to dislocate business as such a holding would do. It must not be forgotten that such a decision would have retroactive effect for several years and unsettle many accounts. We cannot justify a judicial declaration to this effect.

But if only a few cases are to be unsettled—those, say, in positions similar to Bruce's—what becomes of the policy of nondiscrimination? Other canners who have paid cash find themselves competing with Bruce who is absolved from paying for a very large part of its cans—something like one-third of its annual dollar volume being involved in this case. In other words, as penalty for establishing a uniform one to five percent discount, the Can Company would be obliged to give Bruce something over a 30% discount on one year, or about 5% on all purchases shown by the evidence ever to have been made.

It is urged that holdings under the Sherman Antitrust Act supply an analogy for allowing this defense under the Robinson-Patman Act. The former provides, among other things, that every contract in restraint of trade or commerce "is hereby declared to be illegal." 26 Stat. 209; 50 Stat. 693, 15 U. S. C. § 1. This Court has held that where a suit is based upon an agreement to which both defendant and plaintiff are parties, and which has as its object and effect accomplishment of illegal ends which would be consummated by the judgment sought, the Court will entertain the defense that the contract in suit is illegal under the express provision of that statute. *Continental Wall Paper Co.* v. *Louis Voight and Sons Co.*, 212 U. S. 227. *Cf. Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173. But when the contract sued upon is not intrinsically illegal, the Court has refused to allow prop-

erty to be obtained under a contract of sale without enforcing the duty to pay for it because of violations of the Sherman Act not inhering in the particular contract in suit and has reaffirmed the "doctrine that 'where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes.'" *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, 174–175; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

Moreover, no single sale can violate the Robinson-Patman Act. At least two transactions must take place in order to constitute a discrimination. Thus, a contract may be made today which has no legal defect under the Robinson-Patman Act A week later, another sale may be made at a different price or at a different discount, and the latter taken into consideration with the former may establish a discrimination. Whether a sale would be rendered void only because of simultaneous discrimination or preexisting ones, or whether a contract valid when made becomes void by reason of later transactions, and if so, how much later, are questions we need not decide now. It is plain that the violation, if there was one, is not inherent in the contract sued upon, whether it be the notes or the sale of the goods, but can only be found in different transactions which a party to the litigation had with third persons who are not parties. No such defense has been approved under the Sherman Act, and, furthermore, these characteristics show that the entire basis for judging under the two Acts is different and that the case law as to the Sherman Act does not fit the Robinson-Patman Act.

None the less, we are urged to supply judicially the sanction of invalidating obligations to pay for goods sold and delivered because it is said otherwise the courts become parties to the enforcement of a discrimination. If, in order to prove his own case, a plaintiff proves his violation

of law, then no court will aid the plaintiff to recover.[4] Here, however, what the plaintiff must show is the notes which import consideration. If consideration is denied, he can prove that cans were sold and delivered at a stated price. That is no violation of law. It is only when the Court goes outside of the dealings between plaintiff and defendant and it is proved that the same kind of cans were sold to others at different prices within a relevant period of time, amounting to a discrimination—a fact unnecessary to sustain the plaintiff's cause of action—that the basis of the defense asserted here appears. The Court does not give its approval to transactions between one of the litigants and a third party just because it holds them irrelevant in this litigation.

The defendant's claim to be freed of the obligation to pay his promissory note because the payee, as vendor of cans, made sales to others that when compared with sales to itself may be held unlawfully discriminatory, cannot be supported as resting on any congressional word or policy. Not only was this remedy not named by Congress, but it would be surprising if it had been, in view of the remedies Congress did give. We have assumed for the purposes of this case that petitioner could establish that the prices respondent charged were discriminatory so that they violated the Act. But if petitioner can show that, clearly it would be entitled to recover in a triple damage suit supported by the same evidence. For despite petitioner's plaint on the difficulty of proving damages, it

[4] In *McMullen v. Hoffman*, 174 U. S. 639, for example, the Court refused to enforce a partnership contract which was based on an illegal and fraudulent agreement to submit collusive bids for public construction. The plaintiff argued that the partnership contract itself did not disclose any illegality, but even that was questionable. The Court, moreover, held that the agreement to be partners could not be separated from the general collusive agreement which gave rise to it. Agreements with third persons, not parties to the suit, however, were not relied upon by Court or litigants.

would establish its right to recover three times the discriminatory difference without proving more than the illegality of the prices. If the prices are illegally discriminatory, petitioner has been damaged, in the absence of extraordinary circumstances, at least in the amount of that discrimination. No reason suggests itself why Congress should have intended a remedy by which the victim of discrimination could recover by defense only one-third of what he could recover, on the same proof, by offense. The inducement of thrice the damages suffered may bring the sufferer to aid in enforcement of the statute. To assure his help, however, it would hardly be thought appropriate to offer him the choice of taking only one-third that amount. Since the remedy embodied in petitioner's second theory would be but a weak one-third shadow of the one Congress expressly gave, we cannot see the need for judicial reduplication in miniature. We hold that federal law does not support the defense alleged and the judgment of the Florida Supreme Court is affirmed.

# SUPREME COURT OF THE UNITED STATES

No. 27.—October Term, 1946.

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| Bruce's Juices, Inc., Petitioner, v. American Can Company. | On Writ of Certiorari to the Supreme Court of the State of Florida. |

[April 7, 1947.]

Mr. Justice Murphy, dissenting.

The issue in this case is whether sellers of goods should be allowed to use the courts to collect price differentials which have been made illegal by Congress in the Robinson-Patman Act. The Court approaches but never quite meets that issue. But the unmistakable effect of the Court's decision is to permit the recovery of discriminatory prices despite the plain language and policy of the Act and despite the lessening of competition that might thereby result. I remain unconvinced, however, that such a result is consistent with the high ideals of our judicial system or that it is made necessary by any rule of law or policy.

Section 3 of the Act makes it unlawful for any person to be a party to any sale which discriminates, to his knowledge, against competitors of a purchaser by granting to that purchaser "any discount, rebate, allowance, or advertising service charge" not available to the competitors in respect of a sale of goods of like grade, quality and quantity. 15 U. S. C. § 13a. Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, makes it unlawful for any person "to discriminate in price between different purchasers of commodities of like grade and quality" where the result is to lessen competition or to tend to create a monopoly. 15 U. S. C. § 13 (a). It is in light of these statutory provisions that we must examine the opinion of the Court.

1. The Court proceeds on the basic assumption, unsupported by the record or by petitioner's contentions, that the petitioner is seeking to avoid all liability for the cans sold to it by the respondent. No such assumption is justified. Petitioner's brief, it is true, suggests two alternative theories in support of its position: (1) a transaction unlawful under the Robinson-Patman Act constitutes criminal action upon which no money judgment can be based; (2) discriminatory prices over and above the fair value of the goods cannot be collected by the seller. But petitioner does not pursue the first alternative, pointing out that only the second and narrower alternative is presented by the record. Thus the only contention really before us is that promissory notes cannot be collected by legal action to the extent that they represent a price differential outlawed by Congress. As petitioner notes, this contention "does not require the Court to decide that the entire transaction is so tainted with illegality that the seller cannot collect even the fair value of the goods, thus giving the buyer a windfall." If the petitioner were to prevail in this case and the promissory notes were to be declared unenforceable, respondent would still be free to recover on a *quantum meruit* basis if it has not already so recovered. See *Penn-Allen Cement Co.* v. *Phillips & Sutherland*, 182 N. C. 437, 109 S. E. 257.

Moreover, there is a strong indication that petitioner already may have paid the respondent the fair value of the cans. Since the passage of the Robinson-Patman Act, petitioner has had a continuing account with the respondent; under that account, petitioner paid respondent more than $2,000,000 for cans during the period from 1937 to 1942. When this suit was instituted, petitioner owed a balance of $114,000 on this account, represented by the promissory notes in issue here. To deny enforceability to those notes might thus affect only the discriminatory price differential, which the Court assumes violated the Robinson-Patman Act.

It also appears that the quantity discounts in issue were based upon the aggregate dollar value of annual sales rather than upon individual transactions. The discriminatory differentials had a like basis. Hence it is enough if petitioner can prove that the $114,000 in notes represents an illegal differential from this over-all standpoint.

The Court states, however, that the transactions represented by the $114,000 cannot be identified and that this figure cannot be said to reflect the separate item of price discrimination. But such sentiments are necessarily premature in the present posture of the case; petitioner has not yet had a full opportunity to present all its evidence or to try to connect the notes with a discriminatory differential. Petitioner concededly has the burden of proving that the $114,000 in notes does represent the discriminatory part of the purchase price, whether in relation to specific transactions or to the aggregate dollar volume of annual sales. If it cannot so prove, its case collapses. The important and the only point now is that petitioner should be given the chance to prove this defense. We should not shut the court's door in petitioner's face before it has had that chance. Nor should we prejudice that defense by holding or intimating that proof is impossible. Certainly the right to offer and prove a defense is not to be denied because a court thinks that the purported defense has not yet been proved. It is one thing to raise a defense; it is quite another to prove it. Since we are concerned here only with the first proposition, it is beside the point whether the defense has been or can be proved.

We may thus dismiss as unwarranted the Court's fear that petitioner is going to get something for nothing if its contention is sustained. It is pleading only for the right to defend against the collection of that which Congress has declared illegal.

2. Equally irrelevant is the Court's inquiry into whether Congress "wanted to go so far as to permit a buyer to get goods for nothing" where the Robinson-

Patman Act has been violated. In the case before us, the only relevant inquiry is whether the Robinson-Patman Act was designed to allow sellers to recover illegal price differentials through court action. A determination that the Act precludes such a recovery does not involve a finding that the framers of the Act desired these sellers to forfeit all the value of the products on which they placed an illegal price differential. It involves simply a finding that the language and policy of the Act frown upon the use of the courts to effectuate what Congress clearly made illegal.

3. The Court thinks it significant that the Robinson-Patman Act makes no provision for a buyer interposing the vendor's violation of the Act as a defense to a suit by the vendor. It is said that the triple damage actions and the criminal proceedings are the exclusive sanctions provided by Congress for the enforcement of the Act.

This overlooks the fact, however, that a specific statutory provision is unnecessary to make an illegal contract unenforceable in the courts. Where a contract is outlawed by statute or is otherwise contrary to public policy, the illegality may be set up as a defense to a suit for enforcement despite the absence of a legislative recognition of that defense. Otherwise the courts would become parties to the illegality by sanctioning the enforcement of the unlawful agreements. *McMullen* v. *Hoffman*, 174 U. S. 639, 669–670. This principle has been applied many times by this Court. At an early date it was recognized that, despite the absence of a provision in the Sherman Act authorizing a defense of illegality in a private suit on a contract, such a defense might be used, that "any one sued upon a contract may set up as a defence that it is a violation of the act of Congress, and if found to be so, that fact will constitute a good defence to the action." *Bement* v. *National Harrow Co.*, 186 U. S. 70, 88. *Continental Wall Paper Co.* v. *Voight & Sons Co.*,

212 U. S. 227. Similarly, without specific statutory permission, private litigants have been allowed to invoke the policy of the antitrust laws so as to limit the scope of patent rights. *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U. S. 661; *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173; *B. B. Chemical Co.* v. *Ellis*, 314 U. S. 495; *Morton Salt Co.* v. *Suppiger Co.*, 314 U. S. 488; *Katzinger Co.* v. *Chicago Mfg. Co.*, 329 U. S. 394; *MacGregor* v. *Westinghouse Co.*, 329 U. S. 402.

And so when a contract or promissory note is tainted with a violation of the Robinson-Patman Act, its enforcement should be refused by a court, at least to the extent of the illegality involved. The failure of Congress to mention such a sanction slips into insignificance in the light of precedents in analagous situations.

4. The Court holds, however, that the Robinson-Patman Act invalidates discrimination rather than contracts of sale at discount and that the analogy of denying the enforcement of contracts violative of other antitrust laws is imperfect.

But such a holding misconceives the very nature of the Robinson-Patman Act and the evils at which it was directed. No one contends that the Act makes illegal all contracts of sale at a discount. Nor does any one deny that an illegal discrimination becomes apparent only after there have been two or more sales. As the Court states, a contract may be made today which has no legal defect under the Robinson-Patman Act. But once there are two or more sales and once there has been illegal discrimination, the illegality may reach back to the first transaction, which was free of all defects when made. That is inherent in the very nature of discrimination and it should not surprise us to discover that fact. Discrimination may thus become evident in contracts, promissory notes, open accounts and other forms of indebtedness. And it may put in a tangible appearance when a subsequent suit is brought

to recover, among other things, what has proved to be an illegal price differential. To deny effect to that discrimination in a suit by the vendor does not require that a court hold void the entire transaction and permit the buyer to retain the goods free of any charge. It requires only that the court refuse to permit the recovery of that part of the purchase price which discriminates against the buyer who purchased the same kind and quality of goods as his competitors.

Thus that part of a contract of sale permitting a certain discount may be or become illegal if the purchaser's competitors are given larger discounts. Such is the whole tenor and policy of the Robinson-Patman Act. And collection of the discriminatory differential falls squarely within the area of illegality defined by the statute. Indeed, the Act is shorn of much of its meaning if the vendor is permitted to recover the fruits of his unlawful conduct. Courts should not be used for that purpose any more than they should be used to sanction recovery on contracts made wholly void by the Sherman Act. In the one case, courts are asked to give judgment for an unlawful price differential; in the other, they are asked to enforce a monopolistic agreement. In both cases, the answer should be a strong negative. The Acts are part and parcel of the same legislative policy, the Robinson-Patman Act merely elaborating some of the more subtle and refined monopolistic practices which Congress desired to eliminate. Courts should treat them accordingly.

It is no answer to say, as the Court does, that we must go outside the transaction in issue in order to give effect to a defense of unlawful discrimination. Of course that must be done, for discrimination is a relative matter depending upon the vendor's transactions with third parties. But such an inquiry must be made by a court in suits for triple damages under the Robinson-Patman Act. *American Can Co.* v. *Ladoga Canning Co.*, 44 F. 2d 763. And

an inquiry of that type must frequently be made in private suits where defenses are made under the Sherman Act. Discriminations and monopolies rarely if ever appear on the face of documents which are introduced for purposes of securing a recovery in a court of law. Judges constantly must look beyond the particular documents in issue. Surely, if it be assumed that a particular discount is unlawful, no factor of inconvenience or burden in looking at other transactions can justify ignoring the illegality and permitting an unwarranted recovery. And to insist that recovery must be allowed if the plaintiff shows no violation of law in proving the amount due on a promissory note is to hark back to medieval concepts of pleading and practice. The Robinson-Patman Act deals with complex economic realities. Litigants and judges must act accordingly when the Act is properly brought into issue by a defendant. If the policy of the Act is to be respected, the transaction before the court must be judged on the basis of other dealings by the vendor despite the superficial perfection of the vendor's pleadings and proof.

Nor is recovery to be denied because only part of the illegality may be in issue. Courts must strike down illegality wherever it appears. Statutory violations are not to be countenanced merely because the violator seeks to reap only part of his illegal harvest at a time.

5. The Court intimates, without actually deciding, that courts should not allow this type of defense to be raised until the Federal Trade Commission has determined the economic effects of quantity discounts on competition. The fear is expressed that without the Commission's guidance, courts might strike down all quantity discounts and create untold retroactive liabilities.

The short answer is that we should be reluctant to assume that judges are unable to comprehend the Robinson-Patman Act and the standards it sets up in regard to quantity discounts. It may be granted that the Fed-

eral Trade Commission has more technical knowledge and experience in dealing with the complexities of this problem than most courts; and the Commission's judgment would be of inestimable value to any judge called upon to deal with quantity discounts. But in the absence of some action by the Commission, courts must act as best they can within the framework provided by Congress. The Act, 15 U. S. C. § 13 (a), specifically recognizes that quantity discounts are illegal only where they lessen or injure competition or tend to create a monopoly; and where price differentials are justified by differences in costs of manufacture, sale or delivery, the discounts are permissible. This matter is a complex one, but it is no more complex than many other problems which face the courts.

The only alternative to the Court's apparent position in this respect is for judges to sit idly by and allow sellers to collect illegal price differentials—a function that hardly qualifies as an ideal toward which we should strive. Indeed, if the Court's conception of the judicial function in suits of this nature is to be carried to its logical conclusion, judges would abdicate all their duties under the Robinson-Patman Act whenever the Federal Trade Commission has failed to express an opinion on the subject in issue. They would refuse to entertain treble damage suits and would dismiss all criminal indictments brought on the basis of an alleged violation of the Act. It seems to me, however, that the judicial process has more vigor and responsibility than the Court seems willing to imply in this case.

6. Finally, the Court indicates that the fact that petitioner is a small business concern is a treacherous basis for deciding issues of law. As a general proposition, there can be no dispute with that attitude. But we must not blind ourselves to the equally important fact that the antitrust laws, of which the Robinson-Patman Act is an integral part, are designed primarily to aid the small busi-

ness concerns and to curb the growth of giant monopolies. Many years ago this Court had occasion to point out that trade and commerce may be "badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class, and the absorption of control over one commodity by an all-powerful combination of capital." *United States* v. *Trans-Missouri Freight Assoc.*, 166 U. S. 290, 323. The same observation applies to this case. The Robinson-Patman Act was designed in large part to protect the small business concerns, Congress realizing the disastrous effects of their being the victims of discriminatory prices. A proper treatment of the Act demands appreciation of this purpose.

We should pause long before sanctioning the recovery of discriminatory prices which Congress has found inimical to the nation's welfare. We should be on guard against the use of the judicial process to augment the subtle destruction of small business contrary to the legislative will, and the erosion of the barriers which Congress has erected against the flood-tide of monopoly. To that end, therefore, we should reverse the judgment below and allow courts to give full effect to the Robinson-Patman Act.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE RUTLEDGE join in this dissent.